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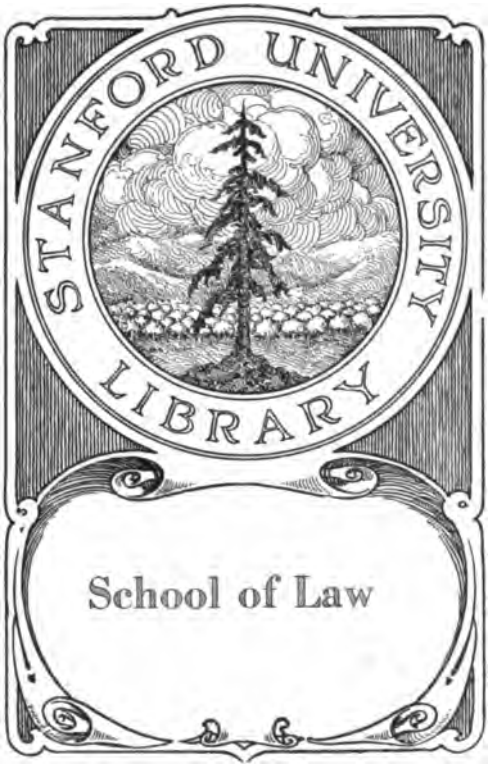
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TABLE OF CANADIAN CASES

REPORTED AND NOTED IN THIS VOLUME.

Adamson v Adamson, 384.
Aitcheson v Mann, 371.
Allan v Corporation of Amabel, 142.
Allen, re Peacock v Allen, 242.
Attorney-General v Midland Ry. Co., 441.

Baillie v Dickson, 384.
Bank of British North America v Walker, 421.
Bank of Commerce v Bricker, 179.
Bank of Montreal v Haffner, 369.
Barber v Morton, 165.
Barker v Leeson, 97.
Barrett v Barrett, 56.
Barsalou v Darling, 237.
Bate v Mackey, 139.
Bearinger v Thrasher, 221.
Beaty v Bryce, 443.
Beavis v. McGuire, 384.
Beckett v Johnston, 141.
Bell and Codlin, *In re*, 15.
Bell v Landon, 178.
Bell v McDougall, 282.
Bennett v Grand Trunk Railway Co., 364.
Bergeron v Lascelle, 237.
Berry v Zeiss *et al*, 54.
Bertram v Bawden, 399.
Bickford v Howard, 422.
Birkett *et al* v McGuire *et al*, 144.
Blain v Blain, 403.
Bleecker and Henderson, *Re*, 56.
Bourget v Blanchard, 423.
Bradley v Bradley, 438.
Braley v Ellis, 96.
Bright v McMurray, 207.
Brockville (Dominion) Election 1882, 324.
Bronson and the City of Ottawa, *In re*, 368.
Brown v Brown, 224.
Brown v McKenzie, 203.
Brown v Sweet, 275.
Buist v McCombe, 365.
Burke v Taylor, 10.
Burritt v Murdock, 59.
Byrne v Box, 14.

Cameron v Campbell, 273.
Cameron v Leroux. 243.
Campan v Lucas, 42.
Canada Pacific Railway Company, *Re*, 288.
Canada Permanent Loan and Savings Co. v Foley, 403.
Canada Southern Ry. v International Bridge Co. 144.
Carlisle v Tait, 166.
Carmichael v Sharp, 263.
Caswell v Murray, 76.
Chadbourne v Chadbourne, 426.
Chamberlain v Armstrong, 99.
Chamberlein v Clark, 121.
Chapman v Rogers, 303.
Chapman v Smith, 427.
Charles, *Re*, Fulton v Whatmough, 222.
Clarke, *Re*, 97.
Clarke v McEwan, 402.
Cleaver v North of Scotland Mortgage Co., 95.
Consolidated Bank v Wallbridge, 202.
Confederation Life Assurance Co. v O'Donnell, 238,
Cornish v Manning, 76, 143.
Court v Scott, 41.
Court v Walsh, 206.
Crathern v Bell, 10.
Creighton v Chittick *et al*, 161.
Crowther v Cawthra, 121.
Cruso v Bond, 142.
Cunningham v Canada Southern Ry., 98, 281.

Dalby v Bell, 13.
Darling v Darling, 424.
Davidson v Maguire, 145.
Davidson v Oliver, 95.
Davis v Austin, 364.
Davis v Wickson, 167, 241.
Defoe, *Re*, 386.
Devlin v Queen's Ins. Co., 94.
Dickson v Carnegie, 96.
Dobell v The Ontario Bank, 263.
Dockstader v Phipps, 75.
Dominion, &c., Co., v Stinson, 13.
Dominion Telegraph Co. v Silver *et al*, 164.
Dowler. *Re*, 55.
Downey v Parnell, 241.
Dunbar v Meek, 41.
Dunsford v Dunsford, 14.
Dunsford, *Re*, 14.
Dumble v Dumble, 13.
Duprey, *et al* v DuCondie, 93.

Edgar v Magee, 277.
Elliot, *In re*, 75, 143.
Ellis v The Midland Railway, 366.
Emmett v Quinn, 274.
English v Mulholland, *In re*, 43.
Essery v Court Pride, 326.
Exchange Bank v Stinson, 40

Farrell v Cameron, 54,
Faulds v Harper, 263.
Fee v McIlhargey, 425.
Fisken v Chamberlain, *et al*, 403.
Fleming v Hall, 445.
Fletcher v Noble, 371.
Fletcher v Rodden, 143.
Foley v Canada Permanent L. & S. Co., 423, 444.
Forrister *et al* v McDonald, 421.
Foster v Stokes, 442.
Francis v Francis, 77.
Fraser v The Gore District Ins. Co., 327.
Freed v Orr, 56.
Fulton v Whatmough, *Re* Charles, 222.
Furlong v Carrol, 144.

Gairdner v Gairdner, 223
Gallerno and Rochester in re, 10
Gananoque v Stimden, 139
Gill v Canada Fire and Marine Co., 178
Gillies v McConochie, 179, 401
Goodal v Smith, 39
Goodyear Rubber Co. v Foster, 277
Gowanlock v Mans, 402
Grand Junction Railway Co. v The Midland Railway Co., 302
Grant v Grant, 99
Grant v McAlpine, 10
Grant v Van Norman, 364
Grass v Austin, 367
Great Western Railway Co. v Lutz, 41
Groom v Darlington, 241
Guest v Guest, 423
Guest v Hunter, 440
Guilford v Anglo French S. S. Co. 163

Hall, In re, 402
Harding v Cardiff, 281
Hargreaves v Sinclair, 278
Harris v Mudie, 275
Harvey v The G. T. R. and G. W. R. Cos., 276
Hawkins v Mahaffy, 12
Haywood v Hay, 140
Heaman v Seale, 13
Hendrie v Beattie, 74
Hewson v Macdonald, 240
Hill, In re. 386
Hilliard v Thurston, 180
Hodgins v Ontario Loan Co., 146
Holman v Green, 161
Hood v Martin, 242
Hopkins v Hopkins, 401
Hopkins v Smith, 425
Houston v Houston, re Houston, 222
Howes v The Dominion Ins. Co., 264

TABLE OF CANADIAN CASES.

Hughes v Hughes, 444
Hunter v Vanstone, 366
Hunter v Wilcockson, 424, 444

Inglehart v Gagnier, 75
Ingram v Taylor, 166
Intercolonial Bridge Co. v Southern Railway, 329
International Bridge Co. v. Canada Southern Ry., 144

James v. Balfour, 366
Jellett v Anderson, 303
Jessup v Grand Trunk Railway. 143
Johnston v Bennet, 265
Johnston v Johnston, 403
Jones v Dunbar. 40
Joseph v Haffner, 75

Keefe v Ward, 166
Keith v Fenelon Falls, 348
King v Hilton, 74
Kirkpatrick v Stephenson, Re Kirkpatrick, 121
Klein v The Union 345

Lambiere v School Trustees, 365
Langman v Martin, Re, 120
Leplante v Scamen, 97
La Roche v O'Hagan, 277
Lavin v Lavin, 145, 240
Lawlor v Lawlor, 221
Leaming v Wood 166
Lee v Credit Valley Ry. Co., 100
Leighton v Medley, 277
Lightbound v Hill, 74, 98
Lindsay v Morrison, Re, 444
London and Canadian Loan Co. v Merritt et al, 279
Longhi v Sanson, 10
Love, Re, 371
Lowson v Canada Farmers Mutual Ins. Co., 43. 55
Lucas v Ross, 371

Macdonald v Henwood, 279.
Macdonald v Worthington, 385.
Macfie v Hunter, 75.
MacNab, *In re*, 97.
Major, F. X. v Corporation of the City of Three Rivers, 422.
Martin v Lafferty, 243.
Martin v McAlpine, 240.
Malcomson v Wade, 221.
Maytham, *Re* the Tug, 285.
Merchants Bank v. Bell, 12.
Merchants Bank v Campbell, 41.
Merchants Bank v The Queen, 271.
Miller v Hamelin and Wife, 367.
Miller v O'Brien, 304.
Mills v Kerr. 383.
Misener v Township of Wainfleet, *Re*, 53.
Mitchell *qui tam* v Phillips, 283.
Monaghan v Horn, 273.
Moore v Mellish, 370.
Morrison v Taylor, 74.
Munsie v Lindsay, 207.
Murray v Gillett, *et al*, 78.
Murton v Kingston and Montreal Forwarding Co., 278.
Muskoka Election Petition 304
Mutton v Dey 365.
McCall v Canada Farmers' Mutual Ins. Co., 217.
McCallum v Odette, 272.
McCardle v Moore, 423.
McCausland v McCallum. 344.
McClive *et al* solicitors, *In re*, 98.
McClung v McCracken, 443.
McCrae v White, 146, 426.
McDonald v Field, 180.
McDonald v Oliver, 369.
McDonald v Lane, *et al*, 239.
McDougall v Campbell, 92.
McDowall v Phippen, 143.
McGee v Campbell, 280.
McLaren v Canada Central Railway Co., 141.
McLean *et al* v the Queen, 271.
McLean v Pinkerton, 367.
McLellan v McKinnon, 277.
McPherson v The Queen, 93.
McSorley v Mayor of St. John and Landall, 238.
McTiernan v Fraser, 329, 341.

Napier v Hughes, 76
National In. Co. v Egleson, 11, 121
Neill v Travellers Ins. Co., 385
Neill v Union Mutual Ins. Co.. 145
Nelles v Bank of Montreal, 385
Nelles v Second Mut. Ins. Co., 11.
Nixon v Maltby, 276
Noble v Corporation of Toronto, 95
Norris v Meadows, 165
North of Scotland Mortgage Co. v Udell, 94
Norvall v Canada Southern Ry. Co , 98, 243, 281

Oakland v Roper, 176
O'Brien v O'Brien, 345
O'Brien, Re, 387
O'Connor v Anderson, 424
O'Doherty v The Ontario Bank, 140
O'Donohue v Whitty, 326, 426, 443
O'Grady v McCaffrey, 142
Oliver v Davidson, 273
Omnium Securities Co. v Ellis, 143
Ontario Glass Co. v Swartz, 371
Oshawa Cabinet Co. v Note, 60

Page v Austin, 146
Page v Proctor, 39
Parkhill v McLeod, 14
Parkhurst v Roy, 273
Parry Sound Lumber Co. v Ferris et al 413
Peacock v Allen ; re Allen, 242
Patterson v Mulock, 349
Peck v Peck, 265
Petition of Right, *Re*, 138
Petrie v Guelph Lumber Co. *et al*, 176.
Petrie v Hunter, 440
Pierce v Canavan, 165
Plumb v Steinhoff, 344

Queen v C. A. Robertson, 220
Queen v Doutre, 218
Queen v Frawley, 275
Queen *ex rel.* Grant v Coleman, 385
Queen v Hodge, 275
Queen v McFarlane *et al*, 219
Queen v McNally, and Wm. McNally, Claimant, 93
Queen v O'Rourke, 239

Rees v McKeown, 365.
Regina v Bennett, 401.
Regina v Chute, 139.
Regina v Cluff, 120
Regina v Grainger, 10.
Regina v Richardson, 10.
Regina v Smith, 10.
Regina *ex rel.* Watt v Lang and Chadwick, 42.
Reid *et al* v Ramsay 138.
Reid v Smith, 205.
Reid v Wilson, 58.
Ricker v Ricker, 274.
Roberts v Hall, 177, 328.
Robinson v Hall, 277.
Rosenburger v Grand Trunk Ry. Company, 278.
Rosenstadt v Rosenstadt, 426.
Ross v Hunter, 162.
Ross, *In re*, 11.
Rumohr v Marx, 55 444,.
Russell, an Insolvent, *In re*, 384.
Russell v The Canada Life Assurance Co., 142.
Russell Election, *In re*, 400.

Sackville v Pacey, 14.
Sanders v Malsberg, 206.
Sanders, *In re* the Township and Town of, 368.
Saylor v Cooper, 262.
Scott v Creighton, 371.
Segsworth v Meriden Silver Plating Co,, 440.
Shepherdson v McCullough, 140.
Seivewright v Leys, 76, 262.
Slater v Mosgrove, 12.
Smith v Doyle, 142.
Smith v Goldie, 276.
Smith v Raleigh, 346.
Snarr v Granite Curling and Skating Co,, 96.
Solicitors, *In re*, 55.
Sproule v Stratford, 179.
Squier, *Re*, 74.
St. Catharines and Lincoln, *Re* 11.
Steers v Shaw, 139.
Stewart, *In re*, Appeal from the Court of Revision, 322.
Stewart v Rounds, 365.
Stoeser v Springer, 367.
Stuart v Tremaine, 369.
Summers v Summers, 142.
Sutherland v McDonald, 166.
Swainson v Bartley, 15.
Swainson v Bentley, 370.
Swaisland v Davidson, 370.

Thurlow v Beck, 403.
Thurlow v Sidney, 278.

TABLE OF CANADIAN CASES.

Tilt v Knapp, 425.
Torrance v Torrance 225.
Town v Borden, 221.
Township of Monaghan v. Doblin, 180.
Township of Pembroke v Canada Southern Ry., 328.
Township of Sarnia and the Town of Sarnia, *In re*, 368.
Trerice v Birkett, 140.
Tribe v The Landed Banking Co., 179
Trinity College v Hill, 387.
Troop *et al* v Hart, 163.
Trude v Phœnix Insurance Company, 54.
Trust & Loan Co. v Lawrason *et al*. 400.
Turley v Benedict. 274.
Turner v Kyle, 402.

Union Fire Insurance Company v Lyman, 53

Vankoughnet v Denison, 205
Vansickle v Vansickle, 96
Vermilyea v Guthrie, 402
Vetter v Cowan, 40
Village of Brussels v Ronald, 222

Wade v Kelly, 139
Wallace v Cowan. 43
Wallace v Whaley 329
Watson v Ketchem, 442
West Huron Election, *In re*, 400
Whitley v McMahon, 279
Whitney v Toby, 347
Widmeyer v McMahon, *Re*, 40
Wigle v Harris, 243
Wilkes v Wilkes, 121
Wilkins v McLean, 441
Wilmot v Stalker, 178
Wilson v Gilmour, 94
Wilson v Brown and Wells, 145
Wiltsey v Ward, *In re*, 98
Winfield v Kean, 277
Withrow v Malcolm, 347
Wolfe v Hughes, 177
Woodhall *Re*. 282
Woodward v Shields, 141
Workman v Robb, 42, 276

Young v Robertson, 387

TABLE OF CASES

REPORTED AND NOTED IN THIS VOLUME IN "RECENT ENGLISH DECISIONS" AND "RECENT ENGLISH PRACTICE CASES."

Abbott v Andrews, 261
Abercrombie v Jordan, 135
Albion Life Assurance Society, *In re*, 92
Appleyard. *Ex parte*, 91
Aston, In the goods of, 101

Babbage v Coulburn, 396
Baker, *In re*, Collins v. Rhodes, 379.
Banner v Berridge, 8
Barber, *In re*, 92
Barber v Blairberg, 217
Barkshire v Grubb, 92
Bastin v Bidwell, 7
Beatty v Gillbanks, 397
Benton, *In re*, 156
Bidder v. McLean, 343
Biggs v Bree. 171
Blake v Blake, 378
Blight v Hartnoll, 157
Bonner, *In re*, 133
Brake, In the goods of, 112
Bray v Tofield, 89
Brown, Bailey and Dixon, *In re*, 108
Brown v Manchester and Sheffield Ry. Co., 396
Brown v North, 325
Burrard v Calisher, 180, 261
Burrow v Scammell, 132

Caledonian Ry. v Walker, 554
Campden Charities, *Re*, 67
Cassaboglow v Gibbs 395
Castellain v Preston, 296
Cercle Restaurant Co. v Lavery, 90
Chaston v Seago, *In re* Chaston, 7
China Trans-Atlantic SS. Co. v Commercial Union Assurance Co., 118
Citizens Assurance Co. v Parsons, 196
Clarbrough v Toothill, 101
Clark v Wood, 396
Clarke v Bradlaugh, 115
Cockburn v Edwards, 70
Colgan, *In re*, 158
Collins v Rhodes, *In re* Baker, 379
Coltman, *In re*, 130
Cooper v Crabtree, 133
Cooper v Vesey, 160
Cory v Burr. 154
Cottons trustees, *Re*, 254
Cross, *In re* Harston v Tenison, 322
Curtis v Sheffield, 343
Curtius v Caledonian Fire and Life Insurance Co., 172

Dalton v Angus, 31
Durrant v Ricketts, 160
Davidson v Kimpton, 6
Davies, *Ex parte*, 130
Dawes v Tredwell, 68
Deacon v Dolby, 180
DePereda v DeMancha, 214
Dobie v The Temporalities Board, 197

Eames v Hacon, 67
Edwards, *Ex parte*, 153
Elton v Curteis, 113
Emden v Carte, 18
Errington v Metropolitan District Railway, 252
Eynde v Gould, 326

Fergusson v Davison, 232
Firth, *Ex parte*, 213
Flower v Saddler, 377
Fraser v Murdoch, 35
Freme v Clement, 71
Forbes v Jackson, 253
Foster v Elsley, 216
Fowler v Barstow, 136

Gathercole v Smith, 80
General Financial Bank, *Re*, 380
German Date Coffee Co., 338
Gibbs v Guild, 154, 375
Goddard v Jeffreys, 171
Goddard v O'Brien, 356
Golden v Gillam, *Re* Johnson, 381
Goodier v Johnson. 70
Gordon v The G. W. Ry. Co., 114
Graff v Evans, 230
Great Britain Mutual Life Ass. Society, *Re*, 113, 381

Halsey v Brotherhood, 213
Harlock v Ashberry, 7, 251
Harpham v Shacklock, 154, 160
Harris v Truman, 396
Harrison v Cornwall Mineral Ry. Co., 43, 67
Harston v Tenison, *In re* Cross, 322
Harter v Coleman, 254
Hart v Hart, 109
Hartmon v Foster, 57
Halton, In the goods of, 111
Ha en Gold Mining Co., *Re*, 387
Hayward, *In re*, 215
Haywood v The Brunswick Benefit Building Society. 175
Heatley v Newton, 211
Heaven v Pender, 397
Helenslea, The, 161
Henry v Armstrong, 109
Hensler, *Re*. 253
Henty v Wrey, 215
Hicks v Faulkner 134
Hobbs v Midland Ry. Co. 383
Hodgson v Railway Passengers Ass. Co. 394
Holloway v Cheston, 218
Hopkins *In re*, 130
Horner's Estate, *In re*. 133
Hornby v Cardwell, 136
Howell v Metropolitan District Railway Co. 217
Hudson *In re*, 382

Ince Hall Mills Co. v Daylas Forge Co., 135
Ivay v Hedges, 376

Jackson v Litchfield, 235
Jenkins v Jones 378
Jennings v Hammond, 395
Jennings v Jordan, 19, 30
Johnson, *Re*, Golden v Gillam. 381
Johnston v Orr-Ewing, 339
Johnstone v Cox, 112
Jones v Wedgewood, 113

Keate v Phillips, 90
Knapman v Wreford, *Re* Knapman, 67

Laird v Briggs, 112
Lamb *Ex parte*. 132
Lawes, *In re* 320
Lawrie v Lees 195, 196 203
Lechmere v Lloyd, *In re*, 88
Leggott v Barnett 173
Lemaitre v Davis. 157
Lilley v. Doubleday. 49
Llano er v Homfray, 155
London, Bombay and Mediterranean Bank, *In re*, 91
London and County Banking Co. v Groome 153
London and County Banking Co. v Ratcliffe. 30
Lumsden v White 261
Lyell v Kennedy. 383

Marsden v Lancashire and Yorkshire Railway Co. 100
Marshall v Berridge 155
Mercier v Pepperall, 113
Metropolitan Board of Works v Steed, 232
Middleton, *Re* Thompson v Harris, 252
Millen v Brash, 114

TABLE OF CASES.

Mitchell v Humfray, 295
Mordaunt v Benwill, 158
Morgan v Thomas, 234
Morrell v Morrell, 318
Morton v Palmer, 170, 377
Mullins v Treasurer County of Surrey, 194
Musoorie Bank v Raynor, 355
McMahon v Field, 51

Nicoll v Fenning, 156
Norden v Defries, 233

Ormerod v Todmerden Joint Stock Mill Co., 303

Palmer v Lockes, 68
Parker v Wells, 44
Patching v Barnett 172
Paul v Paul 113
Pawsey v Armstrong, 110
Peters v Lewes and East Grinstead Ry., 69
Pitman v Universal Ins. Co., 394
Prehn v Bailey, 53
Pugh v Heath, 340
Pulling v Great Eastern Railway Co., 377

Queen v Ganz, 377
Queen v Hall, 50
Queen v Holl 43
Queen v Martin, 114
Queen v Whitchurch, 20

Redgrave v Hurd, 174
Regina v Coney, 234
Regina v Justices of Cumberland, 230.
Regina v The Justices of Great Yarmouth, 234
Regina v Lovell, 135
Regina v Newman, 299
Regina v Slator, 153
Regina v Wimbledon Local Board, 232
Reynolds, *Ex Parte* 380
Rhodes v Rhodes 198
Richards v Cullerne 79
Richdale *Ex parte*, 213
Ringer v Thompson, 170
Roberts v Death, 101
Roberts. *In re*, 251
Robertson v Amazon Tug Co., 51
Robson, *In re*, 131
Rolls v Isaacs. 156
Rolph, *Ex parte*, 181
Rosenberg v Cook 133
Royce v Charlton, 114
Rule v Jewell, 108
Russell, *In re*, 213

Sanders v Sanders, 236
Schneider v Batt. 56
Scott v Sampson, 232, 236
Seagram v Tuck, 9
Seddon v Bank of Bolton 214
Shardlow v Cotterell, 9, 30, 321
Singer Manufacturiug Co. v Long, 69
Smith v Chadwick, 319
Smith v Lucas, 89
Solomon v Bitton, 135
South Eastern Ry. Co. v Thompson, 362
Sotheran v Dening, 322
Spiller, *In re* 91
Stedman, In the goods of 111
Streeter, *Ex parte*, 155
Sturge v G. Western Railway Co., 214

Taylor v Johnstone, 253
Thol v Henderson 232
Thompson v South Eastern Ry. Co., 362
Thompson v Harris, *Re* Middleton, 252
Toke v Andrews 204
Tomlinson In the goods of, 111, 118
Truman v Redgrave, 89
Truscott v Diamond Rock Boring Co., 379
Turner v Bridget 362
Turner v Hancock; 342, 381

Vicary v The Great Northern Ry. Co., 325
Von Busech, In the goods of, 112

Walker v Mottram, 212
Waller v Loch, 110
Warner v Jacob, 339
Watson v Watson 231
Wensley. In the Goods of, 231
Werdermann v Societe Generale d'Electricite, 18
Western Counties Ry. Co. Windsor and Annapolis Ry. Co., 198
Weston v Metropolitan Asylum District, 231
Whitworth *In re*, 131
Wigsell v The School for the Indigent Blind 229
Wilkins, *In re*. 92
Wilkinson v Hull Ry. Co., 381
Wilkinson v Unwin 111
Williams, *Ex parte*, 71
Wilson v Raffalovich, 50
Wilson v Strugnell 49

Yorkshire Ry. Waggon Co. v Maclure, 215
York Tramway Co. v Willows, 298
Young v Leamington, 235
Young, *Ex parte*, *Re* Young, 119

Canada Law Journal.

VOL. XVIII. JANUARY 1, 1882. NO. 1.

DIARY FOR JANUARY.

1. Sun...*New Year's Day. 1st Sunday after Christmas.*
2. Mon..County Court Term and Heir and Dev. Sitt. begin. [Municipal Elections held.
4. Wed..Toronto Assizes.
6. Frid..*Epiphany.* Christmas Vacation ends.
7. Sat...County Court Term ends.
8. Sun..*1st Sunday after Epiphany.*
9. Mon..Chancery Division sittings begin.
10. Tues..Court of Appeal sittings begin. Hamilton Assizes. [Chrisrmas Vacation in Supreme Court ends.
12. Thurs..Sir Charles Bagot, Governor-General, 1842.
15. Sun..*2nd Sunday after Epiphany.*
16. Mon..First meeting Mun. Council (except County Council).
17. Tues...Second Intermediate Examination. Heir and Dev. [sitt. end.
18. Wed..Second Intermediate Examination.
19. Thurs..First Intermediate Examination.
20. Frid..First Intermediate Examination.
22. Sun..*3rd Sunday after Epiphany.* First Engli-h Parlia- [ment, 1256.
24. Tues..First meeting of County Council. Primary Examina- [tion.
25. Wed..Sir F. B. Head, Lieut.-Governor U.C., 1836. Prim- [ary Examination.
29. Sun...*4th Sunday after Epiphany.*
31. Tues..Earl of Elgin, Governor-General, 1847.

TORONTO, JAN. 1, 1882.

SIR ROBERT LUSH, one of the Lord Justices of Appeal in England, died last week, in his seventy-fourth year, and Sir James Fitzjames Stephens is to succeed him.

A NEW Patent Bill is shortly to be laid before the Imperial Parliament under the patronage of the Society of Arts, which seems to comprise some features of interest. It apparently proceeds on the principle that it is better that every patent should pass through a preliminary examination before it is granted, rather than to allow a man to take out a patent at his peril and to run the risk of its being an infringement. It also aims at taking the administration of patents out of the legal domain and establishing a new tribunal, which shall consist of commissioners—say a lawyer, an engineer, and a chemist—who are not only to examine applications, but also to try actions singly, the right of appeal to the full body being reserved to the litigants. This latter feature of the scheme certainly seems open to the objections advanced by Mr. Justice Stephen, at a meeting of the society, at which the project was advanced, viz., that there is no branch of law which contains so many and such interesting principles as the law of patents; and a chemist and an engineer could not be expected to understand the application of them; while judges on the other hand are specially trained in the art of acquiring information from others, and in applying legal principles to that informatiou.

A MEETING of the bar took place in the Convocation room at Osgoode Hall, on the morning of the 30th ult., Dr. L. W. Smith being in the chair. The object was to select a committee of six members of the bar to cooperate with an equal number of benchers in making arrangements for an entertainment, at Osgoode Hall, on the occasion of the opening of the new building. The following gentlemen were elected to serve on the committee: Messrs. W. T. Boyd, S. J. Vankoughnet, F. J. Joseph, J. Campbell, A. H. F. Lefroy, and T. Ridout. A report of a meeting of barristers previously held was read by the chairman, from which it appears that the entertainment contemplated by the benchers is a conversazione, opening with a speech from the treasurer. Members of the glee clubs of the Universities are to be invited to attend, and we presume it will be within the province of the joint committees to provide more definitely for the form the entertainment is to take. As to another suggested feature of the entertainment, the argument may no doubt be advanced that in the good

old days Queen Elizabeth trod a measure with her Chancellor in the Hall of the Middle Temple. However, we cannot have Queen Elizabeth, no matter how willing the Chancellor might be, and it is perhaps a question whether the dances of this end of the 19th century are quite as much in harmony with the *genius loci* as the stately measures of the great Queen Bess.

WE see that at length the prisoner Guiteau is in the prisoner's dock, a position he has well earned for himself. A more scandalous burlesque than the trial in this case from first to last is not on record in this century. It is quite true, as the *Albany Law Journal*, says of the "repulsive reptile Guiteau," that "every word he has spoken has helped to damn him, and it may be that the wisdom of Judge Cox's course in letting him say his say and go his length is now more than ever obvious, and that if he is given enough rope he will probably hang himself;" but there is a limit to all things and we cannot help thinking it is high time that the good sense of the people should rise superior to their love of sensation and put a stop to scenes which have brought the administration of justice into contempt and ridicule.

THE *Central Law Journal* for Dec. 16th publishes an article on the right of a prisoner to be present at his trial, suggested naturally enough by the conduct of Guiteau, and his constant and outrageous interruptions during the proceedings in Court. The writer points out that it has been a rule of the common law that a prisoner on trial for a felony has the privilege of being present in person during his trial, confronting the witnesses, and hearing the evidence; and that if he be absent at any time, the proceedings would be void. In several of the States there are statutory enactments to the same effect. It has been held, however, in some of the American Courts that this right to be present may be waived, and the writer expresses his opinion that such would probably be the case, if the prisoner acted in such a violent manner that it would be necessary to remove him and place him in sequestration. But since none of the cases have decided how far the case of misbehaviour in Court would apply to a person found to be *non compos mentis*, the forbearance of the Court in allowing Guiteau to remain rather than run the chance of giving ground for a new trial seems easily explicable.

THE severe sentences passed upon the persons convicted of bribery at the recent elections in England has excited much comment there. Three of them were solicitors in good standing; two of these were sentenced to nine months', and one to six months' imprisonment. Great pressure was brought to bear for a remission of the sentences, but the Government remained firm in their intention to stamp out bribery, if possible, by severity of punishment. We agree, however, with the English *Law Journal*, that the severity of the sentences (three of the culprits being publicans and sentenced to three months' imprisonment) "is not always in the ratio of the time given to each. The punishment of nine months for a solicitor and three months for a publican is not represented in the arithmetical proportion of nine to three."

IT is indeed good news that some endeavour is to be made to make the atmosphere of the library a trifle better than that of a coal mine immediately after an explosion. Patent systems of ventilation are not indeed always remarkable for their

success. But hope springs eternal in the human breast, and we shall look forward to ultimately breathing air at the Hall as pure as the administration of justice that goes on within its walls. In the meanwhile an immense deal would be gained by religiously opening the two small windows that do exist in the library, every evening, and leaving them open all night. Inasmuch as these windows open outward at a slant, there can be no risk of any rain entering which could do any appreciable damage.

COSTS WHEN DEFENDANTS SEVER.

The question of costs, when defendents sever in their defence, is one of much importance to the practitioner.

At Common Law there is usually no difficulty. For, speaking in general terms, if the alleged breach of contract or tort be a joint one they cannot sever, and if the contract be not joint, as in the case of an action against the maker and endorser of a promissory note, they may sever, and if successful, each be entitled to full costs of defence.

In Chancery, on the other hand, it is somewhat difficult at all times to say when defendant may or may not sever under the risk of losing costs, if successful. All parties connected with or interested in a single transaction must, in the same suit, be brought before the Court, or it will be defective for want of parties, but it is far from saying that they must be represented by the same solicitor, as their interests may be and often are diametrically opposite.

Possibly it may be assumed that the new procedure may affect this question, but practically it will not. It is true, under Order 50, judges may decline to allow costs or deal with them otherwise than they usually do. The effect of Order 50 is to give judges in all actions control over costs; a power which has always been inherent in the judges of the Court of Chancery.

Such a discretion has been and will be rarely exercised, and in cases where the defendant really has no merits or his conduct has been inequitable, and possibly in cases of hardship, or where the suit has been totally unnecessary.

It may also be here pointed out that the ordinary retainer of two or more defendants only enables the solicitors to claim from each his proper share of the costs incurred, and such a retainer is not a joint and several contract. It is the several contract of each client to pay his share only of costs incurred for the benefit of two or more defendants.

Any variation from this must be strictly proven: *Re Colquhoun*, 5 De G. Mac. & G. 35. The taxing Master certified to the Court in this case the practice of the taxing Masters of the Court of Chancery upon this point. See also *Harmon* v. *Harris*, 1 Russ. 155, 157. This may seem a hardship, but it would, on the other hand, be an undoubted hardship for the defendant to be liable for all costs incurred in all cases, and the solicitor has it always in his power to decline to proceed unless his costs are paid, or he be furnished with proper funds as the case progresses. It may be stated in general terms, that defendants representing the same interest must join in defending, and be represented by the same solicitor upon terms of being allowed but one set of costs, if successful; and that defendants who have identical but separate interests need not join.

Trustees and *cestuis que trust* should not sever: *Farr* v. *Sheriffe*, 4 Hare, 528 In *Wiles* v. *Cooper*, 9 Beav., 294, residence of trustees in different parts of the country justified them in severing, but this would not now be followed. See former case, where this case was not followed.

So mortgagors and mortgagees should not sever, and if they do, the mortgagee or assignee of a fund will be entitled to full costs

to the exclusion of the mortgagor or assignor, on the ground that the mortgagee or assignee is bound to protect the debt and estate of the mortgagor or assignor and to stand in their place: *Greedy* v. *Lavender*, 11 Beav., 417.

If two trustees sever, one imputing misconduct to the other, and this clearly appears by evidence, the innocent trustee is entitled to his full costs to the exclusion of his co-trustee. If the evidence be not clear, only one set of costs will be allowed, and an allegation by a trustee that his co-trustee has kept the books and accounts, and that he knows nothing in respect to them, will not entitle such trustees to separate costs: *Attorney-General* v *Wyville*, 28 Beav., 464; *Hodson* v. *Cash*, 1 Jur. N. S., 864.

An innocent trustee ought, if requested, to join in a suit to recover proceeds from a defaulting trustee: *Hughes* v. *Key*, 20 Beav., 395. But, if he is not applied to and is made a defendant, the plaintiff, even if successful, must pay his costs: *Reads* v. *Sparks*, 1 Moll., 8.

Parties attending in the Master's office must appear by the same solicitor, and but one solicitor will be allowed to represent a class. The principle is that suits should not be burthened with unnecessary costs of many parties. The same rule would no doubt apply in solicitor and client costs, unless the solicitor took express care to point out to his client that the effect of his not appearing with a co-defendant in the same interest may disentitle him to costs altogether, if unsuccessful.

LAW SCHOOL LECTURES—CONSTITUTIONAL LAW.

On Dec. 13th ult., Mr. Thomas Hodgins, Q.C., Chairman of the Law School, commenced a course of lectures on the above subject, as one of the lecturers in the now re-established Law School. By his kindness we are enabled to place before our readers some notes of the contents of these lectures, and of the line taken by the lecturer.

Mr. Hodgins commenced by pointing out that the Constitution of Canada differs from that of Great Britain on the one hand, and from that of the United States on the other, in that it is in part a written and in part an unwritten Constitution; unwritten, in so far as it is defined by the B. N. A. Act to be "similar in principle to that of the United Kingdom," (Preamble, B. N. A. Act); and written, in that the same instrument constitutes legislatures with enumerated and therefore limited powers. He also pointed out that while our Constitution derives its leading features of, political government from that of England, its legislative government embraces many of the distinctive characteristics of the Federal system of the United States. He then proceeded to mention some of the definitions given by writers of authority of certain terms of constitutional law, *e.g.*, "Constitution," "State," "Nation," "Sovereignty," "Government." As to the last, and the division of the powers comprised in it into legislative, executive, and judicial, Mr. Hodgins quotes from Cooley's Cons. Law 44, the somewhat striking observation that legislative power deals mainly with the future, and executive power with the present, while judicial power is retrospective, dealing only with acts done, or threatened, promises made, and injuries suffered. As the lecturer observed, "sovereignty" is the most important item to be explained in connection with the governmental and legislative powers of the Federal and Provincial authorities, and he remarked that besides the use of this word to signify supreme, absolute, uncontrolled power, it is often used in a far more limited sense to designate such political powers as, in the actual organization of the particular state or nation, are to be exclusively exercised by certain public functionaries without the control of any superior authority. In support of the argument that colonial legislatures or governments are "sovereignties" within the limits

of their territories, he cited Story on the Cons., sec. 171; *Phillips* v. *Eyre*, L. R. 6 Q.B. 20, per Willes, J.; *Reg.* v. *Burah*, L.R. 3 App. 889, per Lord Selborne. He then proceeded to consider the position of the Provinces of the Dominion of Canada, and the applicability of the statute and common law of England to these Provinces, taking as his text the rules reported by the M. R. on Aug. 9, 1722 (2 Peere Williams, 75), as having been determined by the Privy Council on appeal from the foreign plantations, viz.:

(1.) That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though after such country is inhabited by the English, Acts of Parliament made in England without naming the foreign plantations will not bind them.

(2.) Where the King of England *conquers* a country, there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases.

(3.) Until such laws be given by the conquering prince, the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact anything that is *malum in se*, or are silent, for in all such cases the laws of the conquering country shall prevail.

These propositions, Mr. Hodgins remarked, have been modified by the judgment of Lord Mansfield, C. J., in *Chapman* v. *Hall*, Cowp. Rep. 204, in which the principle of constitutional law was affirmed that after a proclamation providing for a legislative assembly in a conquered colony, the king's prerogative power of legislation was irrevocably gone. He then proceeded to point out that under the British system of constitutional government, when the name of the sovereign is mentioned it means the sovereign acting by and with the advice of his responsible ministers; and that similar constitutional rules apply to the Governor-General of the Dominion, and to the Lieutenant-Governors of the Provinces, as asserted by Mr. E. Blake and by Sir J. A. Macdonald, Canadian Ministers, in 1877 and 1879 respectively (S. P. Can. No. 89, 1877, p. 452; S. P. Imp. 1878-9, Can. p. 109); but at the same time he drew attention to a despatch of the Colonial Secretary in 1838, which pointed out that a colonial governor is an Imperial officer who derives his instructions from England (Mill's Col. Cons. 28). Perhaps we may be also permitted to refer here to 16 C. L. J. p. 317, seq.

The lecturer then entered upon a very interesting and detailed discussion as to whether it is or is not correct to say that, even where, under the modern colonial system, parliamentary government has been granted to the colonies, the Imperial Parliament still retains its "paramount authority" over such colonies in matters of legislation. Among assertors of the affirmative of this proposition he cites Clark (Colonial Law, p. 10), and Forsyth (Constit. Law, p. 21); Blackburne, J., in *Reg.* v. *Eyre*, in 1868, and Willes, J., in *Phillips* v. *Eyre*, *supra*, and we might add to those mentioned by Mr. Hodgins, the authority of Mr. Alpheus Todd (Parl. Govt. in British Colonies, p. 189). On the other hand, Mr. Hodgins cited the words of Lord Chancellor Hatherley, in 1870, in moving the second reading of the Naturalization Bill (now 33 Vict. c. 14, Imp.), in the House of Lords, viz., "The clause contains a proviso that it shall not confer any right to hold property situated out of the United Kingdom, for *we cannot govern the colonies having legislatures of their own*," (199 Hans. 1126) and to show that it is legitimate to cite this speech as a judicial authority, Mr. Hodgins quotes the opinions of the Lords Justices in *Reg.* v. *Bishop of Oxford*, L. R. 4. Q. B. D. 525. Mr. Hodgins then proceeded to reason this question out to its logi-

cal conclusion. He asks, if the Crown's authority to legislate for the colony is divested by the establishment of a local Parliamentary Government in the case of a Crown grant, on what logical ground can it be argued that, after the establishment of local Parliamentary Government by an Imperial Statute, legislative power within the colony is retained by the Imperial Parliament, and is a "paramount authority" therein, in the case of a Parliamentary grant? And if so retained, then to what extent? He argued in the first place that to exercise an unlimited "paramount authority," as contended for in Clark's Col. Law, p. 10, would be tantamount to saying that the Imperial Parliament may at its pleasure, by legislative acts, to which the Colonial subjects of the Crown are no parties and against their consent, deprive the colonies of their Parliamentay constitutions, and may wholly or in part abrogate and repeal one or all of their local and mucipal laws. Such an exercise of Imperial legislative power, the lecturer contended, would be an invasion of the established order of local government, and a destruction of the constitutional compact between the Empire and its colonies, and would therefore be revolutionary, and that whatever is revolutionary is unconstitutional. He then proceeded to consider analogies, which may be furnished by supposing other great constitutional interests to be similarly dealt with. He especially cited the Act passed by the Imperial Parliament in 1778, (18 Geo. 3, c. 12) which contains, as he declared, a constitutional declaration of Imperial non-interference in colonial taxation, and was in effect a grant or surrender to the colonial legislatures of so much of the Imperial sovereignty as affected taxation in the colonies; and summed up his conclusions in the following words: "The Imperial statutes establishing local government and legislatures in the colonies belong to the same class of constitutional enactments. The power to make laws for the peace, order and good government of a community is equally an incident or attribute of sovereignty. The grant of that power by the Imperial Parliament to the local legislatures implies a full and complete grant, an actual giving of the power, not in any sense as to an agent or delegate, but as a sovereign power, and to the extent defined in the intrument granting it. Such a grant must be held to be governed by the rules of construction applicable to other grants, and must be construed as a grant of sovereignty; and means a divesting by the granting power of the thing or power granted."

Finally, he remarked that the considerations to which he had adverted might lead to a more accurate and thorough review of our constitutional system, and a better understanding of the limitations of Imperial Parliamentary control over colonies having legislatures like those of Canada.

RECENT DECISIONS.

We have still some cases to notice in L. R., 18 Chy. D., p. 1–299, which was partially reviewed in our last number.

WILLS—CONSTRUCTION.

Davidson v. *Kimpton*, p. 213, decides a rather peculiar question arising upon a will. A testator, after giving a life interest in a sum of £10,000 to his four daughters, with gifts over, in equal shares, to their issue respectively, provided that in case any one or more of the daughters should die without leaving issue her or them surviving, the share or shares of the stock so bequeathed to and intended for the issue (had there been such) should go "unto the survivors or survivor" of the four daughters, equally if more than one, and if but one, to that one, absolutely. Three of the daughters married, and died leaving children. The fourth, the petitioner, was the longest liver, and was a spinster of the age of fifty-four. Fry, J. observed that:—"Inasmuch as a person cannot be his or her

own survivor, it remains to inquire whether the real meaning of the word is not 'longest livers, or longest liver of the class of daughters.'" And he held such to be the true meaning of the words. "The petitioner," he said, "has not survived the class of daughters, but she is the longest liver of the class." He, therefore, held that the petitioner would be entitled to her own share of the £10,000 absolutely if she should die without leaving issue, and that by reason of her age it might be assumed that she will never have any children, and her share might be transferred to her then.

In re Chaston, Chaston v. *Seago*, p. 218, is also a will case. The testator in the will in question, after leaving certain legacies to his sons and daughters, provided, in certain events, for a gift over of the said legacies "or so much thereof as shall not have been paid to him, her, or them so dying;" which he afterwards described as "such part thereof as shall not have been received by them." It was contended that a gift over of so much of a share as shall not have been paid to or received by a legatee is void for uncertainty. Fry, J., however, after expressing disapproval of a recent decision of Malins, V. C., in *Bubb* v. *Padwick*, 13 Ch. D., 517, said: "I believe all the earlier cases proceed simply on this enquiry: Is the contingency expressed with definite certainty? If it be, we will give effect to it; if it be not, we will not give effect to it. . . . I think it needless to go through the earlier authorities, because, having considered them with some attention, it appears clear that that was the principle on which they all proceeded. . . . Independently of authority I should have thought it sufficiently distinct, but the cases to which I have referred shew, in my judgment, that the words in this will must have reference to the period appointed for distribution [not to the time of actual payment or receipt]. That is in no way uncertain, and therefore no difficulty exists."

FORECLOSURE ACTION—STATUTE OF LIMITATIONS.

Harlock v. *Ashberry*, p. 229, is a fresh authority for the view taken in former cases, that an action for simple forclosure is not an action to recover the sum of money secured by the mortgage, but is an action to recover land, the recovery of the money, if it occurs at all, resulting, not from the object of the action, but from the conditions which the Court imposes on the right of the plaintiff: and therefore it is within sects. 2 and 24 of Imp. 3 and 4 Will. 4. c. 27 (sects. 4 and 29 of R. S. O. c. 108), and not within sect. 40 (sect. 23, R. S. O. c. 108). It decides, moreover, that the right of the mortgagee to recover the land, will be kept alive under Imp. 7 Will. 4 and 1 Vict. c. 28 (R. S. O. c. 108 sect. 22) by a payment made "by the mortgagor, or by any agent of the mortgagor, or by any person who, as between the mortgagor and the mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt;" (per Fry, J. p. 234); for example, as in this case, the tenant whose land is mortgaged is a person who, as between the mortgagor and the mortgagee, is liable to make a payment to the mortgagee in satisfaction of the mortgage debt; and therefore his payment to the mortgagee will keep alive the mortgagee's right to forclosure.

RENEWAL OF LEASE--COVENANTS—CONDITION PRECEDENT.

Bastin v. *Bidwell*, p. 238, was a case of a lease in which the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent and performing and observing the covenants" in his lease, and Kay, J., after reviewing many of the decisions as between covenants independent, and covenants forming conditions precedent, held that in this case the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, and the acts covenanted for not having been completed either when the six months' notice

was given or when it expired, the lessee was not entitled to a renewal of his lease.

MORTGAGE—STATUTE OF LIMITATIONS— EXPRESS TRUST.

In the next case of *Banner* v. *Berridge*, p. 254, two questions arose, which are of some interest: (1) the first was whether where the second mortgagee of a ship claimed an account against the first mortgagee, who had sold the vessel, upon the mortgagor becoming bankrupt, but where the amount of the surplus in the hands of the first mortgagee was not ascertained, there was such an express trust as would bar the Statute of Limitations. Kay, J., first discusses, in his judgment, what constitutes an express trust, and after reviewing the cases, arrives at the conclusion that, although to say an express trust is a trust expressly declared by deed, will, or some other written instrument, (as per Kindersley, V. C., in *Petre* v. *Petre*, 1 Drew, 371), may be correct as referring to express trusts of land only, which must be in writing, yet it is not an exhaustive definition of the general meaning of the term; for that there may be an express trust without any actual expression in words, where property or money wholly and solely belonging to a person who deposits, is deposited with another person for the benefit of the depositor. He then goes on to show by a series of decisions that even where the words of the mortgage express a trust in the most clear and emphatic manner, the Court is very loth to hold the mortgagee to be a trustee to all intents and purposes. Finally he sums up as to this point thus: "I take the true results of these decisions to be this, that in this particular case, where there was no trust expressed, either in writing or verbally, of the proceeds of the sale, no trust can possibly arise until it is shown there is a surplus, and then I should be disposed to hold there is sufficient fiduciary relation between the mortgagor and mortgagee to make the mortgagee constructively a trustee of the surplus, in case it is shown it is a surplus. But that seems to me to be a case not of express trust at all but of constructive trust, that is to say, a case of a trust which only arises on proof of the fact that there was a surplus in the hands of the mortgagee after paying himself. And, if that be so, the ordinary rule of a Court of Equity would apply that nobody would be allowed to enter into evidence to raise a case of constructive trust after the statutory period had expired."

(2) The second question in the case was whether there had been a sufficient acknowledgment since the receipt of the money to enable the plaintiff to avoid the bar of the statute. Kay, J., after reviewing the correspondence between the parties, held the result to be a clear admission, not only that there was a pending account which must be settled, in the sense of having the account properly taken and arranged and vouched, but also a clear promise, which I think is sufficiently expressed, that whatever is found due upon the taking of that account would be paid by the defendant. But, at p 274, after citing from Lord Mellish's judgment in *Mitchell's claim*, L. R. 6 Ch. D. 822, his opinion that if there was an admission that an account must be taken, and that there was a right to have it taken, it would be consistent with principle, and with the previously decided cases, that you must infer from that a promise to pay, proceeds to express his opinion to the some effect, viz., that it is reasonable to say that the admission that there was such a pending account is an admission from which you may infer a promise that when the account is settled the balance shall be paid. (3) Kay, J., also decided in this instructive case that he could not allow a mortgagee who had voluntarily sold the mortgaged property before the day upon which the interest becomes payable in advance, but has not received the money, to claim the interest payable in advance when he receives the balance of the money, more than enough to pay him, two days after the day for payment in advance of the interest; for that it would be in the last degree in-

equitable to allow him to have six months' interest for a period, during the whole of which, except two days, he would have the mortgage money in his own pocket. (4) Lastly, it may be observed that this case also illustrates the fact that an express trust bars the statute equally as to personalty and realty by force of the Imp. Judicature Act 1873, s. 25, subs. 2 (Ont. J. Act, s. 17, subs. 2).

SALE BY AUCTION—STATUTE OF FRAUDS.

In the case of *Shardlow* v. *Cotterell*, p. 280, the facts were as follows. An auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. S., butcher, Pinxton, and deposit paid at close of sale;" and he also signed this receipt: "Pinxton, March 29th, 1880. Received of A. S. the sum of £21 as deposit on property purchased at £420, at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th of March at the Sun Inn. Kay, J., alluded to the latitude which has been given in construing the words of the Statute of Frauds, and said he was not disposed to carry the law on this subject one hair's breadth beyond the decided cases and after citing many cases summed up thus: "You must have on the face of the contract a sufficient definite description of the things sold to enable you to introduce parole evidence to show what the articles were to which that description refers, but a mere description of the things sold as 'property' is not, to my mind, sufficiently definite to enable any such parole evidence to be adduced."

The last case in this number of L. R. 18 Ch. D. is *Seagram* v. *Tuck*, p. 296, which decides (1) that money not accounted for and due from a receiver under the Court is, by his recognizance, made a debt of record, although the balance due has not been ascertained: (2) that the receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the Statute of Limitations, although his final accounts have been passed and the recognizances vacated.

Turning now to the recent issues of Canadian reports, we may observe that it is our intention in future only to notice such current Canadian cases as are either cases of first impression or otherwise very remarkable. This seems the better plan for two reasons. First, because they are systematically noted immediately after decision in our Notes of Cases; and, secondly, because the economy of space thus obtained will, we hope, enable us to include in our Reviews of recent decisions, not only those reported in the Law Reports, but also those reported in the *Law Journal* reports and the *Law Times* reports, which will, it is believed, add much to the value of this department of this *Journal* There appears to be no case in the recent issues of Canadian reports,—5 S. C. no. 2,—29 Gr. nos. 2 and 3,—46 Q. B. nos. 4 and 5—to which we need specially call the attention of our readers.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.] [Dec. 13.

REGINA v. SMITH.

Conviction—Summary jurisdiction — Distress.

A request to proceed summarily under the Summary Jurisdiction Act need not be in writing. A conviction awarding fine and costs, and, in default, imprisonment, was held good, and that a distress warrant to levy the fine need not have been first ordered to issue.

H. J. Scott, for the application.

A. Cassels, contra.

Wilson, C. J.] [Dec. 16.

LONGHI v. SANSON.

Overholding Tenants' Act—Forfeiture of lease.

Defendant was lessee from plaintiff of the "refreshment room and apartments connected therewith," being portion of a certain railway station, covenanting that "no spirits of any kind should be sold in the refreshment room," and that on failure to observe the terms of the lease, the lessee should, on the requirement of the lessor, give up the premises, and the lease terminate. On a sale of spirits in the bar-room portion of the premises, the Judge of the County Court adjudged a forfeiture of the lease, and directed a writ to issue to put the landlord into possession.

Held, that the terms of the lease had been violated, and that the lessor was entitled to enter: and that the case was covered by the Overholding Tenants' Act.

Falconbridge, for landlord.

O'Sullivan, contra.

IN BANCO.—DEC. 24.

IN RE GALLERNO AND ROCHESTER.—GRANT v. MCALPINE.

There is no appeal from single Judge to Divisional Court.

H. J. Scott and *Holman*, for appeal.

McCarthy, Q.C., and *Aylesworth*, contra.

REGINA v. RICHARDSON.

Criminal law—Assault occasioning actual bodily harm—Evidence—Competency of defendant.

On an indictment for assault and battery occasioning bodily harm, *Held*, that the defendant is not a competent witness on his behalf.

Scott, Q.C., for Crown.

Osler, Q.C., contra.

BURKE v. TAYLOR.

Fixtures—Mortgagee.

S. gave mortgage of land, on which was erected a saw-mill, and on which there was also machinery, trade and other fixtures, to a bank. Subsequently he put up a drying kiln with iron pipes, and then released his equity of redemption in the land and deeded other property to the mortgagee, who sold to plaintiff the pipes, which were claimed by defendant.

Held, that the pipes were fixtures, and the mortgagees were entitled to them under either the mortgage or the deed.

CRATHERN v. BELL.

Guarantee—Default.

Defendant guaranteed G.'s payment of two notes for $751 each, limiting his responsibility to $751. When the first note came due, G. being unable to meet it in full, defendant gave him his note for the amount required. This G. discounted and used the proceeds, unknown to plaintiff, or without specific appropriation, in payment of the note at a bank where the note was.

Held, that there was no default in payment of the note; that the advance to G. by the defendant, before default in paying plaintiff, was not payment in satisfaction of his liability under the guarantee.

REGINA v. GRAINGER.

Conviction—Certiorari—Quarter Sessions—Review of.

On application to quash a conviction, no facts not appearing in the conviction will be taken notice of by the Court for the purpose of impeaching it on any ground other than want of Jurisdiction.

The Court has no power to either review the Sessions in a matter within their jurisdiction or to compel them by mandamus to re-hear an appeal.

RE ST. CATHARINES AND LINCOLN.

Municipal Act, Secs. 42-6—Arbitrations.

In arbitration between a city and a county, under the Municipal Act the arbitrators have a large discretion; and, therefore, where arbitrators in estimating expenditures (under secs. 42, 44 5, 6), took population as a basis, and the previous five years criminal records as a basis for computing compensation for care and maintenance of prisoners, the Court refused on these grounds to interfere with their award.

CHANCERY DIVISION.

Boyd, C.] [Dec. 14.

IN RE ROSS.

Corroborative evidence—Statute of Limitations—Evidence Act, R. S. O. ch. 63—Executors, retainer by—Allowance of interest.

Where money is lent to be repaid when the borrower is able, his ability may be shown by a slight amount of evidence, such as is open to public observation, of a flourishing condition of his affairs, and it is not necessary to shew that the borrower is in a position to discharge the debt without inconvenience.

Where each item in an account against the estate of a deceased person is an independent transaction and stands upon its own merits, and would constitute a separate and independent cause of action, some material corroboration of the testimony of the party interested in enforcing the demand must be adduced as to each item in order to satisfy the tenth section of the Evidence Act, R. S. O. ch. 63.

Where the estate of a deceased person is insolvent, the provisions of the Act respecting trustees displace any right on the part of the executor to retain in full; and as against an executor claiming as creditor, any other creditor may set up the Statute of Limitations.

The circumstances under which interest on a claim ought to be allowed or refused in the Master's office, considered and acted on.

Boyd, C.] [Dec. 14.

NELLES v. SECOND MUT. INS. CO.

Mutual Insurance Co.—Default in payment on shares—Forfeiture of shares.

The plaintiff, on becoming a member of the defendant company, agreed to accept his shares subject to the rules of the company. Rule 6 was to the effect that in case of default of payment of dues for a year, the directors might forfeit any shares so in default. The plaintiff being in default for a year and upwards, the directors declared his shares forfeited, and this proceeding was afterwards confirmed at a meeting of the shareholders. The plaintiff thereupon instituted proceedings to have such forfeiture declared invalid on the grounds, (1) that notice of the intention to forfeit had not been given to him, (2) that notice of an intention to forfeit had not been served on him in order that he might appeal to the shareholders if so advised; (3) that the resolution did not expel the plaintiff from membership, (4) that the plaintiff's name was not set forth in full in such resolution; it did not specify the shares to be forfeited, and a number of other persons were included whose shares were jointly forfeited; (5) that no notice had been given of the holding of the annual meeting for the election of directors, so that the directorate was not legally constituted, (6) that one of the directors had become insolvent under the Act of 1875, although his shares continued to stand in his name in the books of the company; (7) that it was not shown that proper and sufficient notice had been given of the meeting of the directors at which such forfeiture had been declared; (8) that the plaintiff had capital at his credit in the company out of which the arrears might have been paid; and by a by-law of the company, "all fines and forfeitures should be charged to members liable, and, if not paid, deducted from capital at the credit of such member."

Held, that these objections could not prevail, and that as to the last, this was not such a forfeiture as was referred to in the rules.

O'Gara, Q.C., and *Gormully*, for plaintiff.

Lees, Q.C., for defendant.

Boyd, C.] [Dec. 14.

SLATER v. MOSGROVE.

Statute of Limitations—Payment on account.

A promissory note made by the purchaser, and indorsed by his son, was given as security for the payment of land sold to the defendant. A payment had been made by the indorser of the note.

Held, that such payment was properly applicable to reduce the amount remaining due upon the purchase money, and was sufficient to prevent the running of the statute.

Gormully and *Christie*, for plaintiff.

O'Gara, Q. C., for defendant.

Boyd, C.] [Dec. 14.

NATIONAL INSURANCE CO. v. EGLESON.

Partnership—Stock, Subscription for—Notice of calls.

The defendants, as partners, had been appointed agents of the plaintiffs, on the understanding and condition that they should acquire and continue the holders of 200 shares of the Capital stock of the Co. In pursuance of this arrangement, they were entered in the stock register of the Co. for that No. of shares, under the partnership name of "Egleson & Cluff;" and 200 shares of the original stock were allotted to them and the usual certificate sent. They did not, however, formally subscribe for the stock. A draft upon the firm for the prior call was accepted and paid, as arranged with the defendant C. Subsequently E. wrote the plaintiffs that he was about retiring from the firm, and desiring to be informed as to the position of the "stock subscribed for by them;" signing the letter "I. Egleson, senior partner," &c.

Held, in an action for calls, that the defendants were liable and could not be heard to say that they had not subscribed for the stock.

The notice of two calls, one payable on the 27th of July, the other on the 27th of August, was mailed on the 27th of June, addressed to the firm at Ottawa. which was received by C; there was not any affirmative evidence that it was not communicated by him to E.

Held, that such notice was insufficient, as "not less than 30 days notice" was required; and therefore the mailing of a notice on the 27th of June, requiring a call to be paid on the 27th of July, was not in time:—otherwise the notice was sufficiently established.

Boyd, C. J.] [Dec. 14.

MERCHANTS' BANK v. BELL.

Estate of married woman—Promissory note—Liability of estate of married woman—Notice of dishonour—Sufficiency of notice.

The rule of the Court is that it will not restrain a married woman from dealing with her separate estate pending suit; still if she die seized thereof, the Court will administer her estate for the satisfaction of her debts.

Held, therefore, that the estate of a married woman deceased in the hands of her infant heirs was liable to the payment of a note on which she was indorser

The indorser—a married woman—died intestate during the currency of the note, and notice of protest was sent to "James Beil, executor of the last will and testament of M. A. Bell Perth," and received by the husband, who resided with his children in the house which his decease wife had occupied. No letters of administration had been granted.

Held, that the notice was sufficient, and the interest of the husband as tenant by the courtesy was directed to be exhausted, before resorting to the estate of the children in remainder. The costs of the infant defendants were to be added to the plaintiffs' claim, and paid out of the estate if not realized against the husband.

Proudfoot, J.] [Dec. 21

HAWKINS v. MAHAFFY.

Riparian proprietor—Reservation in grant from the Crown—Easement.

The Crown, in granting a lot situate on the bank of a river, reserved free access thereto for all persons, vessels, &c. There was a quantity of stone on the lot, which the plaintiff desired to quarry, but was prevented by the penning back of the water of the river by the defendant, the owner of a mill thereon below the plaintiff's land.

Held, that the reservation by the Crown in the grant was merely an easement to the public, notwithstanding which the plaintiff was a riparian proprietor, and as such entitled to complain of the injury caused by the penning back of the water thereon.

The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The Court (Proudfoot, J.) appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained.

Proudfoot, J.] [Dec. 21.

DALBY v. BELL.

Consent order—Mistake of parties—Costs.

A decree had been made on consent, referring to the Master the question whether or not the defendant had performed certain work for the plaintiff at a specified rate, who reported that he had not. On appeal, the Court (Proudfoot, J.) considering that this was a question that should have been disposed of by the Court, set aside the report and directed a trial to be had upon that issue, reserving the costs of the proceedings before the Master and of the appeal.

Held, that these costs having been incurred in a proceeding consented to under a common mistake of parties as to the proper tribunal to decide the question, each party should bear his own costs.

Proudfoot, J.] [Dec. 21.

HEAMAN v. SEALE.

Fraudulent preference—Defending one suit and withdrawing plea in another—R. S. O., ch. 118, s. 1.

The defendant, C., defended an action brought against him by the plaintffs, while in an action brought against him by the defendant, S., he entered an appearance, and filed a plea some days before the same were due, and on the day of filing the plea filed a *relicta verificatione*, whereupon judgment was signed and execution issued.

Held, that these proceedings did not offend against the provisions of the Act R. S. O. ch. 118, s. 1, following in this the decisions in *Young* v. *Christie*, 7 Gr. 312, *McKenna* v. *Smith*, 10 Gr. 40, *Labatt* v. *Bixell*, 28 Gr. 593, and *Mackenzie* v. *Watt*, decided in appeal 28th Nov., 1881,—not yet reported.

Proudfoot, J.] [Dec. 21

DUMBLE v. DUMBLE.

Will, construction of—Devise to children—"In case of death," meaning of—Vested interest.

The testator, after having duly made his will, intending to modify it, wrote a letter to his wife, in which he said, "I wish my dear wife and our children to have all my property to be divided equally, my wife to have the use of the whole until the children are of age; in case of death of my children, my wife to have the use of the property for her lifetime, and then to go to my brothers and sisters." The testator left two children, who died during the lifetime of their mother, under age and unmarried.

Held, that the words "in case of death of my children" referred to death before the tes, tator, so that the children took vested interests which their mother took upon their death.

Bethune, Q. C., and *Watson*, for plaintiff; *Maclennan*, Q. C., for defendant.

CHAMBERS.

Boyd, C.] [Dec. 9.

DOMINION, &C., CO. v. STINSON.

Foreign commission—Evidence not used—Costs

The plaintiff obtained an order for the issue of a foreign commission to examine a witness. The order contained the usual direction that the costs be costs in the cause.

The evidence was taken, but neither the plaintiff who succeeded in his suit nor the defendant put it in at the trial.

The taxing officer disallowed the costs of the commission on the ground that the evidence was not used. On reference to him, Boyd, C., held that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiff on the ground that the evidence had not been used.

Mr. Dalton.] [Dec. 2.

RE DUNSFORD.—DUNSFORD v. DUNSFORD.

Examination — Witness — Master's office — Chambers, Rule 285 O. J. A.

The usual administration decree had been made in the suit, and the defendants had filed their accounts in the office of the Master in Ordinary, but nothing further had been done.

The plaintiff's solicitors, learning that a witness whose evidence was said to be material, was about to leave the country, applied to and obtained *ex parte* from the Master in Chambers an order to examine this witness before a special examiner in Toronto, at which place he expected to stay a few days before leaving the country.

The defendant's solicitors were given the usual notice of the order and appointment to examine.

On a motion to discharge the order and set aside the appointment on the grounds that:

1. The Master in Chambers had no jurisdiction to grant an order to examine a witness whose evidence is required in the office of the Master in Ordinary, as the control of the latter over proceedings in his office is complete. G. O., (Chy.) 217-221-222, *Cottle* v. *Vansittart* 2 Chy. Cham. 396, *Hilderbroom* v. *McDonald*, 8 Pr. R. 389.

2. There was no issue upon which the evidence could be given, and the nature of what the evidence was to be was not disclosed.

3. The order should not have been made *ex parte*.

Held, that under Rule 285 O. J. A., the Master in Chambers has full power to direct evidence to be taken at any time and at any stage of the proceedings in a cause.

H. Cassels, for the motion, (the defendant.)

W. Read, contra.

Osler, J.] [December.

PARKHILL v. MCLEOD.

Costs—Guarantee by Solicitor—Execution.

The plaintiff had an order for costs against the defendant, which the defendant's solicitor guaranteed payment of. Taxation was delayed pending an intended appeal from the order. This guarantee was not accepted. There was some delay after the taxation. A Division Court suit had been stayed by the defendant pending the appeal. The defendants solicitors in answer to a demand for the costs and a threat of execution, guaranteed them payment if the plaintiff's solicitor would guarantee their return in case of a reversal of the order. Execution was issued without further notice, and was set aside by the Master in Chambers.

Held, on appeal reversing his order, that the parties had been placed at arms length by the conditional offer of the defendant's solicitor to pay the costs, and in strictness the execution was regularly issued.

Mr. Dalton.] [December.

SACKVILLE v. PACEY.

Counterclaim—Hypothetical case.

Held, that a defendant is not entitled to set up in his counterclaim a hypothetical case for relief against a third party.

Mr. Dalton.] [December.

BYRNE v. BOX.

Division Court bailiff—Interpleader—Costs.

The defendant, a Division Court bailiff, seized goods of the plaintiff under two writs. H. & Co. claimed the books and book debts under an assignment from plaintiff. Debtor applied for an interpleader order, or that H. & Co., be made parties.

Held, that as upon the facts appearing the defendant was not liable, and the plaintiff must fail in the action, the proceedings should be set aside under R.S.O. cap. 73 sec. 8 and Rule 323.

Held, also, that there was no jurisdiction to provide for H. & Co.'s costs.

REPORTS.

ONTARIO.

MASTER'S OFFICE.

SWAINSON V. BARTLEY.

Master's office—Decree manifestly erroneous and unjust—Master's duty—Practice.

Where a decree is manifestly erroneous and unjust, it is the duty of the Master to stay his hand, until the decree is extended or amended in accordance with the true state of the facts.

[Whitby, Oct. 25.—Mr. Dartnell.

The bill was filed to enforce payment of certain legacies which it was alleged were charged equally upon certain lands, of which defendants were devisees, each of one-half, and an account was directed of such legacies, as well as against the whole land, as of one defendant against the other. The bill was *pro confesso*, the solicitors for the defendants being under the impression that their defence could be raised in the Master's office.

On bringing in the decree, the testator's will showed that half the legacies were charged against the land of one defendant and half against the other.

THE MASTER AT WHITBY.—I do not feel I should proceed with this reference. Swainson's will is now produced. From it, it appears that it has been incorrectly set out in the plaintiff's bill. If it had been truly set out no such decree as has been made would have been made. The bill alleges the legacies are charged upon all the lands, whereas one-half only are chargeable against the lands of each devisee. Under this aspect, clause 8 of the decree is manifestly incorrect and unjust. The decree generally makes one defendant liable for the default of the other. The defendant, Swainson, alleges he has fully paid the half of the legacies charged upon his lands, and contends he is not liable for his co-defendant's default, no matter whether he be in default or not. Defendant's solicitors say they did not move against the decree because they thought this defence could be raised before me. As the decree is framed I do not think it can. The decree should be vacated or amended, and one pronounced in accordance with the facts as they now appear. I may add that the Master in Ordinary concurs in those views.

Both parties are in fault; the plaintiff in incorrectly setting out the contents of the bill, and the defendant in not answering, and so letting the clause issue in its present form. I think it is for the defendants to move in rectification, and therefore grant my warrant to proceed with the reference at the expiration of fourteen days, in order to enable them to have the true controversy between the parties properly brought before me.

DIVISION COURTS.

IN RE BELL AND CODLING.

Fence-Viewers' Act—Ditches and water-courses—Duties of fence-viewers—Want of outlet to drain—Jurisdiction—Insufficient description of premises.

[London—Oct. 20.

This was an appeal from the award of the Fence-viewers of the Township of Plympton heard at the sittings of the Division Court at Wyoming, on 20th Oct. last. The award was as follows:

"We, the Fence-viewers of the Township of Plympton, County of Lambton, having been duly nominated to view and arbitrate between Mrs. M. Codling (owner of west half of Lot 27, Con. 15), and Mr. James Bell (owner of east half of Lot 26, Con. 15), upon a ditch required on the property of Mr. James Bell, which ditch is to be made and maintained on said property and having examined the premises and duly acted according to the Act respecting ditching water-courses, do award as follows: A ditch shall be made and maintained by the said parties, commencing at station O., at the boundary line of west half of Lot 27, Con. 15, and the east half of Lot 26, Con. 15, Mrs. M. Codling to commence at station 'O' on former award, and make ten rods of ditch west on lot east half of 26, Con. 15, size of ditch to be two and a half feet deep, and two feet bottom, and one to one foot slope. Mr. James Bell to commence at the end of the above named ten rods, and make a ditch the same size and continue it in a northwesterly direction to strike the old drain already made and continue in the old ditch to

the boundary line between east and west half of Lot 26, Con. 15; the ditch when made to be maintained by James Bell, the ditch to be completed on or before the fifteenth day of October, 1880, cost of digging not to exceed seventy five cents per rod, Fence-viewers' fees to be paid by Mr. James Bell, $6."

A plan of the promises was put in, and Mr. J. H. Jones, Civil Engineer, who made the plan, was examined as a witness for the appellant. Mr. Jones explained that the red line on plan represented the ditch on Bell's lot referred to in the award as "the old ditch already made," and which was to be the outlet for the "new ditch" directed to be made, and which was indicated on the plan by the dotted red line. Mr. Jones further swore that the old ditch was sufficient to drain appellant's land, but was not sufficient to take off the additional water that the new ditch, if made, would bring down into it. This old ditch has an outlet on the highway between Plympton and Bosanquet, but only sufficient under present circumstances and not at all sufficient for the additional water that would be discharged into it by the new ditch. He stated further that the proposed drain would be a damage to Bell and would overflow his land; that the run of the water was to the northwest; that it would be impossible to deepen Bell's drain, and allow the outlet on the highway to remain as it is at present, The old ditch was only about one foot deep and the projected drain was to be two and a half feet deep. One of the Fence-viewers examined, stated "That it was the intention of the award to carry the ditch seven feet wide at the top to the line between Bell and Stonehouse. Bell wanted an engineer, but I thought it unnecessary. I did not go on the Stonehouse property. I knew that the old ditch would have to be enlarged but did not think it necessary to look at the property."

DAVIS, Co. J.—Assuming that the Fence-viewers had jurisdiction in this matter (upon which point I shall refer hereafter) I think it was their duty to look very carefully at the property, and before directing any work to be done they should have satisfied themselves that there was a sufficient outlet, and if there was any doubt on this important point they should have obtained the assistance of an engineer (as was suggested by the appellant). It is quite clear from the evidence that the work directed by the award would be a positive damage to Bell, as well as to his neighbour on the west, if nothing further was done than this award directs; and not only so but Bell is required to make the ditch that will do this injury to himself and his neighbour, and pay besides the sum of six dollars Fence-viewers' fees for directing it to be done. I have no doubt that the Fence-viewers acted with the best intentions, but I think they entirely misunderstood the requirements of the Act of Parliament. They conceived it to be their duty to relieve the person complaining of too much water and take it to his neighbour and leave it there, and so on from one to another, a new award for each case. This is obvious from the fact that on the 10th of May last a like award was made directing the water to be brought down from Lot 28 to Lot 27 by a ditch of the same capacity, and by another award made by the same Fence-viewers on the 18th of the same month they direct another ditch to be made commencing at the termination of the last ditch, and directing it to be continued to the line between Mrs. Codling's property and the appellants'; and the present award (being the third of the series) directs this water to be carried on to the next man's farm—who is also expected in his turn to call in Fence-viewers to make another award directing the water to be taken to the next farm and there left. This is all wrong. Every official act on the part of the Fence-viewers should be thorough and complete; they should see that there is sufficient outlet in all cases, and if no such outlet can be obtained they should not interfere. If Fence-viewers have jurisdiction in a matter like the present I see no reason, if an outlet can be obtained at some point beyond the property in question, why the Fence-viewers should not insist that all the parties through whose property the ditch would have to be cut in getting to the outlet should be notified and made parties to the arbitration. This is the only way a complete award could be made. The other method would be almost impracticable and expensive, and would be an injury and a nuisance instead of a benefit as the Act requires. The award when registered operates as a "lien and charge" upon the lands, and the greatest caution should therefore be exercised in such an important proceeding.

Applying the rules which I hold should govern Fence-viewers in such matters, I must quash the award, which is also bad on the face of it for want of sufficient description as to the starting point and course of the projected drain—"commencing at station 'O' at the boundary line," when there is no plan or map and no further reference to designate the starting point, is not sufficient. The respondent is directed to commence her work at "station 'O' on former award." Nothing can be more uncertain and inaccurate than this. It is most important that everything should be set out very accurately in these awards. The description should be as complete and certain as possible, so that the commencement, the course and termination of the work could easily be ascertained from the award itself or the plans accompanying it.

Apart from the merits of this case, or the regularity of the proceedings, there is some doubt on my mind as to whether the Fence-viewers have any jurisdiction at all in such a case as the present.

By section 3 of R. S. O. cap. 199, (as amended by 43 Vict. cap. 30), secs. 3, 7, 8, 9 and 10, to justify such proceedings adjoining or adjacent lands must be benefitted by one or other of the three things therein specified, viz :

1. By making a ditch or drain.

2. By deepening or widening a ditch or drain already made in a natural water-course.

3. By making, deepening or widening a ditch or drain for the purpose of taking off surplus water from swamps or low miry lands to enable owners or occupiers to cultivate the same.

As to No. 1. Is the appellant benefitted in any way whatever, by having a drain continued across his farm, that was made to drain Lot 28, and not in any way for his benefit? The conclusion I came to at the hearing was what I have before stated. This finding excludes it from the first head. Secondly was the work ordered, "a deepening or widening a ditch or drain already made in a natural water-course." It certainly was not, and the case is thus excluded from the second head. Neither can it be contended that it comes under the third head. If it therefore cannot be classed as a work under either of the three specified heads, the Fence-viewers have no jurisdiction unless subsection four enlarges the meaning and operation of section three, which it appears to do when it declares that "if it appears that the owner or occupant of any tract of land is not sufficiently interested to make him liable to perform any part thereof, and that it is necessary for the other party that the ditch shall be continued across such tract, they may award the same to be done at the expense of such other party, and after such award such other party may do the work at his own expense without being a trespasser." This provision was enacted a couple of years after the passing of the law as it appears in section three (both being consolidated in the revised statutes as cap. 199), and probably was intended to include within the scope and operation of the first Act a class of cases otherwise excepted. This point, however, has not been argued before me, and I express no opinion concerning it, as it is not necessary in deciding this appeal that I should do so.

It is much to be regretted in view of what has already been done under the other two awards, and the heavy expenses incurred in the present proceedings, that the Act gives me no power to correct and amend the award, and continue and modify the proceedings *to the extent required* to make everything legal and attain the ultimate object in view in commencing these arbitrations. I must set aside the award and direct the payment by the respondent to the appellant of such costs herein as I may hereafter tax and certify in due course.

Award set aside.

RECENT ENGLISH PRACTICE CASES

(Collected and prepared by A. H. F. LEFROY, ESQ.*)

WERDERMANN v. SOCIETE GENERALE D'ELECTRICITE.

Imp. O. 16, *r.* 13. *O.* 28, *r.* 1—*Ont. O.* 12, *r.* 15 (*No.* 103). *O.* 24, *r.* 1. (*No.* 189).

Demurrer for want of Parties.

Since the Judicature Acts there is no such thing a a demurrer for want of parties. The proper course is to take out a summons under O. 16, r. 13 (Ont. O. No. 103), to have the necessary party or parties added.

Nov. 11, C. of A., 30 W. R. 33.

Appeal from the decision of Bacon, V.C. I was argued for the demurrer that to demur for want of parties could be done before the Acts : *Dent* v. *Turpin*, 9 W. R. 548, and that as the rules do not say it shall not be done in future, the old practice holds good.

JESSEL, M. R.—As the old practice is preserved where unaffected by the Act or Rules, it is important to consider what are the provisions with regard to demurrer under the new practice [His Lordship read Imp. O. 28, r. 1 (Ont. O. No. 189)]. In that rule, it is true, there is no specific power given of demurring for want of parties. The subject, however, was not forgotten, for a different remedy is given elsewhere in the event of necessary parties not being joined. Imp. O. 16, r. 13 (Ont. O. No. 103), lays down what is to be done if it is desired that such parties should be added. The effect of that rule is that a person who would formerly have demurred for want of parties has had nothing to do but to take out a summons under the rule. The practice of proceeding by demurrer, is, therefore, no longer available.

LUSH, L. J.—I am entirely of the same opinion. Imp. Ord. 28, r. 1 (Ont. O. No. 189), defines a demurrer, and shows it is a mode of challenging the pleadings of the opposite party on some point of substance. The points there mentioned are the only points which can be now taken on the demurrer. It can only raise a point of substance on the ground that the opposite party does not show what he professes to show.

LINDLEY, L. J., concurred.

Appeal dismissed.

[*Imp. O.* 16, *r.* 13, *and Ont. O. No.* 103, *are virtually identical; and Imp. O.* 28, *r.* 1, *and Ont. O. No.* 189, *are identical.*]

EMDEN v. CARTE.

Imp. O. 30. *Ont. O.* 26.

Payment into court by defendant, and defence o non-liability—Right of plaintiff to take money out.

Where a defendan denies liability, but pays money into Court, and pleads the sum paid in is enough to satisfy plaintiff's claim, were his contention right, the plaintiff may obtain payment out under Imp. O. 30, r. 3 (Ont. O. No. 217), and may either under rule 4 (Ont. No. 218) accept it in satisfaction of his claim, and tax his costs and sign judgment for the costs so taxed, or may go on with his action for the purpose of recovering more; and whether the plaintiff succeeds or not in recovering more, or even fails altogether in establishing that the defendant is under any liability, he will be entitled to retain the money so taken out of Court.

[Nov. 3, C. of A.—45 L. T. 328.

JESSEL, M. R., in the course of his judgment said with reference to this point of practice :—

"The first question to be considered is, what is the real character of money as regards property when it has been paid into Court in an action by a defendant, who at the same time denies entirely his liability to the plaintiff? Of course it is obviously inconsistent to say, on the one hand, 'I admit I am liable to you for so many hundreds of pounds;' and on the other to say, 'I deny my liability altogether.' But, though inconsistent, that is a mode of pleading which is now permissible under the Judicature Act, and as has been pointed out by the late lamented Thesiger, L. J., in *Berdan* v. *Greenwood*, L. R. 3, Ex. Div., 251, it is quite intelligible that a man may say, 'I am under no liability to you, but I am willing to pay you a sum of money if you abandon your claim.' And that mode of pleading enables a defendant so to say. But, when he pays it, the legal consequences, as gathered from the judgment of Thesiger, L. J., are exactly the same as if the defendant's pleading had contained nothing but an unqualified admission of liability. The plaintiff has a right to take the money out

*It is the desire of the compiler to make the above collection of cases a complete series of all current English decisions, illustrative of our new pleading and practice, under the Supreme Court of Judicature Act.

of Court and keep it, whether it is paid in as a simple admission of liability (in which case of course he would be entitled to keep it), or paid in in the nature of a payment of, as it is sometimes called, 'blackmail,' to get rid of the trouble or nuisance in some way. It is paid in and the plaintiff has a right to take it out of Court, and to keep it as his own."

BAGGALLAY, L. J., said:—

"The case of *Berdan* v. *Greenwood*, which was followed in *Hawkesley* v. *Bradshaw*, L.R. 5 Q. B. D 302, not only decided that such a form of pleading was correct and proper, or might be had recourse to under the new rules of pleading, but also indicated what the effect of such pleading would be. After the money was so paid in, it was open to the plaintiff to take the money out of Court, solely and entirely at his own option and discretion, either in full satisfaction of the demand made by him in the action (in which case he would tax his costs and sign judgment in the usual way) or to take the money out of Court, and with it go on with the action for the purpose of seeing whether he would be entitled to a larger sum than the amount paid into Court; and then in the event of his so taking the money out of Court, and of eventually there being a judgment in the defendant's favour, either arising out of there being no liability, or arising out of the fact of the money paid into Court being in excess of the amount the plaintiff was entitled to, in either view of the case the plaintiff's right to retain the money would have been clear."

BRETT, L. J., said:—

"The case of *Berdan* v. *Greenwood* appears to judicially decide that such an alternative and inconsistent mode of pleading is now to be allowed, and that so much of that pleading as concerned the payment into Court is to be considered as having precisely the same effect as a payment into Court had before the Judicature Act; that is to say, that, if a defendant will pay money into Court, although at the same time he denies his liability, nevertheless the plaintiff is entitled to take that money out of Court; and, if the defendant afterwards succeeds upon the question of liability, nevertheless the plaintiff is entitled to retain the money so taken out of Court. As Thesiger, L. J., in the judgment delivered by him in *Berdan* v. *Greenwood*, (the judgment of the whole Court, although delivered by him), says: 'The record . . . only shows that the plaintiff has obtained, through the timidity of the defendants, something which he had no right to obtain;' that is to say, that, by the exertion of the plaintiff's solicitor in bringing the action, and the timidity of the defendant in submitting to it, the money is 'recovered or preserved' by the exertion of the solicitor."

LINDLEY, L. J., said:—

"The practical result of paying money into Court in the alternative way in which the money was paid in here will be found worked out in the judgment of Thesiger, L. J., in *Berdan* v. *Greenwood*, and, as I understand it, it comes to to this, that the plaintiff can get the money so paid in. He can take it in one of two ways. He can either take it in satisfaction and tax his costs, which course puts an end to the action; or he can, if he likes, take the money out of Court and go on and try and get more. If he goes on and tries to get more he must prove two things, namely, the defendant's liability, and that the money paid in is not sufficient. He chooses to do that he can, but if he fails, then, as I understand it, he is still entitled to retain what he has got already by taking out of Court the money paid in, the defendant having risked his chance of what might happen if he paid it in in that particular way."

[*The rules under Imp. O.* 30 *and those under Ont. O.* 26 *are virtually identical. It may be mentioned that the C. of A. held, further, in this case, that the money paid into Court had been "recovered or preserved" through the instrumentality of the solicitor within the meaning of sec.* 28 *of the Imp. Solicitors' Act* 1860, (23-24 *Vict. c.* 127) *which enables Courts of Justice to charge property recovered or preserved with payment of costs. No similar clause occurs in our Act respecting Attorneys-at-law, R. S. O. c.* 140].

JENNINGS V. JORDAN.

Imp. O. 16, *r.* 7—*Ont. O.* 12, *r.* 7, (*No.* 95)

Parties—Trustees.

Held, that under above order, trustees of an equity of redemption sufficiently represent their *cestuis que trust* in a redemption suit, no direction to the contrary having been made by the Court.

[Aug. 3. H. of L.—L. R. 6 App. c. 698.

This was an action to redeem a mortgage. It was objected that the *cestuis que trust* of

Price, one of the respondents, who represented n the suit the equity of redemption in a great part of the mortgaged property, ought to have been brought before the Court. The main point for decision in the case was whether the purchaser of an equity of redemption could be affected by a second mortgage, to the same mortgagee, created after the purchase, on another property, or whether he was entitled to redeem the first mortgage without redeeming the second.

Lord Selborne said, p. 710, that he thought Price sufficiently represented his *cestuis que* trust for the purpose of this suit, no direction having been given by the Court to the contrary.

[NOTE.—*The Imp. and Ont. orders are identical.*]

THE QUEEN v. WHITCHURCH.

Imp. J. Act, 1873, *sec.* 47—*cf. Ont. O.* 58, *r.* 1 (*No.* 484)—*Criminal cause or matter.*

Held, an order of Justices under Imp. Public Health Act, 1875, secs. 94, 96 was an order made in a "criminal cause or matter" within meaning of above section of Imp. Act,

[May 20, C. of A.—L. R. 7, Q. B. D 534.

In the above case an order had been made by Justices under the Imp. Public Health Act 1875, directing the defendant to fill up an ash-pit, so as to be no longer a nuisance. Under the provisions of the said Act the Justices might have inflicted a fine, which would have been enforceable as a penalty.

Counsel for defendant in objecting that the order of the Justices was made in a "criminal cause or matter," relied on *Mellor* v. *Denham*, L. R. 5 Q. B. D. 467 as a decisive authority in their favour.

BRAMWELL, L. J. in the course of his judgment said:

"I think that the case before us is governed by *Mellor* v. *Denham*, and that we are bound by that decision. . . . The provisions of the Public Health Act, 1875, have been enacted as a general law for the good of the public . . . Why is not this proceeding under the Public Health Act, 1875, 'a criminal cause or matter,' within the meaning of Jud. Act, 1873, sect. 47? It is certainly not a civil proceeding, and it may perhaps be said that every proceeding is either civil or criminal. Therefore, independently of authority, I am disposed to hold that this is a 'criminal cause or matter.' The difficulty arising in this case exists in others independently of the statute; an indictment for the want of repair of a highway against a person bound to repair it *ratione tenuræ* is a criminal matter; and if the person indicted is convicted, he may be fined by the Court. . . . Again, many of the offences mentioned in s. 91 of the Public Health Act, 1875, are nuisances at common law; some are not. Suppose that a man is charged with one of those offences which are nuisances at common law, proceedings against him may be taken at common law, then he is assuredly a criminal; but proceedings may be taken under the statute, and in that case he is equally a criminal. The same rule must apply as to all offences against the Public Health Act, 1875, sect. 91, whether they are or are not nuisances at common law, and the nature of the proceedings must in all cases be the same. Upon general principles of law, and upon the authority of *Mellor* v. *Denham*, I am of opinion that the case before us relates to a 'criminal cause or matter.'"

BRETT, L. J., said:—

"The legislature has decreed that a penalty should be imposed upon a person offending against the provisions of the Public Health Act, 1875; and it has been decided in *Mellor* v. *Denham*, that to treat the matter in that manner is to treat it as a criminal matter. . . . It is alleged that the power to impose a penalty does not turn the wrongful act into a crime, because an alternative remedy is given, namely, an order to abate or prohibit the recurrence; but I cannot think that an alternative remedy alters the nature of the offence. I think that the present case is decided by *Mellor* v. *Denham*."

COTTON, L. J, agreed that the case was governed by *Mellor* v. *Denham*, and that the alternative mode of proceeding did not take it out of the authority of that decision. The offence was equally criminal, whatever was the form of order made by the Justices. The summons was a proceeding in a criminal matter.

[NOTE.—*Although we have no section in our Jud. Act corresponding to sec.* 47 *of Imp. Jud. Act*, 1873, *it seems right to note the above case as illustrating our order No.* 484, *which though not identical, is similar to Imp. O.* 62, *and which declares that the new rules are not to affect "the practice or procedure in criminal proceedings."*

REVIEWS.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS, by Sir William R. Anson, Bart., M.A., B.C.L., of the Inner Temple, Barrister-at-law, Vinerian Reader of English Law, Fellow of All Souls' College, Oxford: Clarendon Press, Oxford, 1879. American Edition: Edited and annotated with American Notes, by O. W. Aldrich, Ph. D., LL.D., Professor of Law in Illinois Wesleyan University: Chicago, Callaghan and Company, 1880.

Mr. Justice Markby, in the introduction to his Elements of Law, remarks upon the revived demand, observable of late, for a higher standard of legal knowledge, and for a systematic education in law, apart from professional training, and also upon the active steps which have been taken by the Universities of Oxford and Cambridge to do their part towards satisfying this demand. He adds, however, that the only preparation and grounding which a University is either able, or would be desirous to give, is in law considered as a science; or at least, if that is not yet possible, in law considered as a collection of principles capable of being syste, matically arranged, and resting not on bare authority, but on sound, logical deduction; all departures from which, in the existing system must be marked and explained.

One of the latest contributions in this field is the work on thePrinciples of the English Law of Contracts, by Sir W. Anson, Vinerian Reader of English Law at Oxford, the merit of which has been already widely recognized, and which we are heartily glad to see has been recently placed among the text books for use in the Intermediate examinations. It is to be feared, however, that the student who approaches it without some previous acquaintance with the principles of the law of contracts will find it a terribly hard book to master. The very elaborateness of the analysis, combined with the conciseness of the style—qualities which are otherwise its highest commendation—will make it difficult to beginners; and Smith on Contracts, might, we venture to think, have been well retained for the First Intermediate. In places, indeed, the latter writer displays a minuteness of analysis and conciseness of language almost worthy of Aristotle himself, as for example, in the chapter on Discharge by Breach. This we should say was probably the best part of the book, but just in proportion to its excellence would be its difficulty to those who approached it without some previous acquaintance with the subject.

The author observes in his introduction that his main object has been to delineate the general principles which govern the contractual relation from its beginning to its end. He commences by considering the relation of contract to other legal conceptions, and observes that it is a combination of the two ideas of agreement and obligation. Closely following Savigny's analysis, he ultimately defines an agreement as "the expression by two or more persons of a common intention to affect the legal relations of those persons;" and a contract as "an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other."

Having ascertained the particular features of contract as a juristic conception, the author proceeds to treat of the Formation of Contracts. This he does by analysing a contract into its elements, which he then discusses one by one, dividing and subdividing each subject with the greatest thoroughness and perspicuity. These elements are as follows: (1) Proposal and Acceptance; (2) Form and Consideration, *i.e.*, the possession of one or other of those marks which the law requires in order that an agreement may affect the legal relations of the parties; (3) Capacity of the parties to make a valid contract; (4) Genuineness of the consent expressed in Proposal and Acceptance; (5) Legality of the objects which the contract proposes to effect.

After disposing of the subject of the Formation of Contract, the author passes to that of the Operation of Contract, which includes that of the Assignment of Rights. Next comes the Interpretation of Contract, where he deals in a most methodical and lucid manner with the admission of extrinsic evidence in the case of written documents (1) as to the existence of the ocument; (2) that the document is a contractd (3) as to its terms. Finally there remains the Discharge of Contract, while as appendices are two short treatises on Contract and Quasi-contract, and on Agency.

This short summary will give an idea of the plan and contents of the book. Throughout the lucidity, conciseness and minuteness of analysis are remarkable. So also is the originality of view frequently displayed, as for example in the discussion (Part II. Chap. 2. Sec. 4) of the commonly received doctrine that a past consideration will support a subsequent promise, if the consideration was given at the request of the promisor, for which *Lampleigh* v. *Braithwait*, 1 Sm.L.C. 67, is regarded as the leading authority. After examining the cases Sir.R. Anson arrives at the conclusion that unless the *request* is virtually an offer of a promise, the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the request that a subsequent promise may be regarded as a part of the same transaction, the rule in *Lampleigh* v. *Braithwait* has no application, and that in spite of the cases decided between 1568 and and 1635, of the continuous stream of dicta in text-books, and of the decision in *Bradford* v. *Roulston*, 8 Ir. C. L. 468, the rule cannot be received in such a sense as to form a real exception to the principle that a promise to be binding must be made in contemplation of a present or future benefit to the promisor.

Again, a few pages later, he criticises another so-called exception to the last mentioned principle, viz., the supposed rule that "where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration, expressly promises," he will be bound by such a promise. After examining the cases he concludes that, though it may not be safe to say the rule as habitually laid down is non-existent, yet the cases cited in support of it seem to fail on examination to bear it out.

It is also worth while to call special attention to the clearness which the author imports into the involved subject of fraud and misrepresentation, with its manifold distinctions and confused terminology. He distinguishes between (1) fraud, properly so-called; which consists in representations known to be false, or made in such reckless ignorance of their truth or falsehood as to entitle the injured party to the action *ex delicto*, the action of deceit, (2) misrepresentation, properly so-called; which is an innocent misstatement of facts, made prior to the formation of a contract, but not constituting a term in the contract, which never gives rise for an action of deceit, and which only affects the validity of the contract in certain special cases, viz., contracts of marine and fire insurance, contracts for the sale of land, and contracts for the purchase of shares in companies. (3). epresentations form ing a term or integral part of a contract, which do not affect the validity of the contract, but which, if they turn out to be false, entitle the party to whom they were made, either to rescind the contract and be discharged from it, or to bring an action for a breach of one of its terms; and having so distinguished, he proceeds, in his usual way, to illustrate each subject by full reference to a few carefully selected cases.

Before concluding we would also call attention to the historical sketch of the gradual development of the idea of consideration in English law, contained in part II. chap. 2. Sir R. Anson points out that the only contracts which English law originally recognized were the formal contract under seal, and the informal contract, in which consideration was executed upon one side. Gradually, however, consideration came to be regarded as the important element in contract, and even the solemnity of a deed came to be represented as making a contract binding, not by virtue of the form, but because it "imports consideration." And, moreover, validity began to be given to executory contracts, though informal, *i. e.*, not under seal, provided consideration, the universal test, was present. But the doctrine that consideration was the universal requisite of contracts not under seal, was hardly recognized by English Judges in all its breadth until after the time of Lord Mansfield.

As to the American edition of the book we have been reviewing, we are disposed to say that its best point is that it is printed in larger type and better form, than the English original, and that its worst point is that it tampers to some extent with the author's text, a thing, as it seems to us, neither politic, nor in any way justifiable. It is fair, however, to add that a considerable number of American cases are cited, but with what care and judgment we are quite unable to say.

LAW STUDENTS' DEPARTMENT

We publish elsewhere a summary of the first lecture delivered by Mr. Hodgins, chairman of the Law hool under the new *regime*. It will be very interesting to our young friends.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM. 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit:—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term:—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or,
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe,
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same year.

Students-at-Law.

CLASSICS.

1881.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

1882.—The Deserted Village.
The Task, B. III.

1883.—Marmion, with special reference to Cantos V. and VI.

1884.—Elegy in a Country Churchyard.
The Traveller.

1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose:—

1881. 1883. 1885. Emile de Bonnechose,—Lazare Hoche.

1882. 1884. Souvestre,—Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

From and after January 1st, 1882, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R.S.O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobold on Wills; Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday after 21st August.
Michaelmas Term, third Monday in November.

The Primary Examinations for students-at-law and articled clerks will begin on the second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 A. M. on the second Thursday before these Terms.

The Second Intermediate Examination, on the 3rd Tuesday, except in Trinity Term.

The First Intermediate, on the 3rd Thursday, except in Trinity Term.

The Attorneys' Examination the Wednesday, and the Barristers' Examination the Thursday before each of the said Terms.

Candidates for Examination present themselves at A. M.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

Candidates for Call to the Bar must give notice, signed by a Bencher during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00

N.B.—Copies of Rules can be purchased from ROWSELL & HUTCHISON, King Street East, Toronto.

Canada Law Journal.

VOL. XVIII. JANUARY 16, 1882. NO. 2.

DIARY FOR JANUARY.

15. Sun..*2nd Sunday after Epiphany.*
16. Mon..First meeting Mun. Council (except County Council).
17. Tues...Second Intermediate Examination. Heir and Dev. [sitt. end.
18. Wed..Second Intermediate Examination.
19. Thurs..First Intermediate Examination.
20. Frid..First Intermed ate Examination.
22. Sun..*3rd Sunday after Epiphany.* First Engli-h Parliament, 1256.
24. Tues..First meeting of County Council. Primary Examination.
25. Wed..Sir F. B Head, Lieut.-Governor U.C., 1836. Primary Examination.
29. Sun..*4th Sunday after Epiphany.*
31. Tues..Earl of Elgin. Governor-General, 1847.

TORONTO, JAN. 15, 1882.

WANT of space compels us to hold over an instructive article as to the procedure in impeaching the return of a mandamus *nisi*. Also several interesting cases reported for this journal, and several letters from correspondents. They will appear in our next.

WE supplement the valuable collection of Practice Cases under the English and Ontario Judicature Acts in our last volume (which we propose to continue) by a simple Table of reference thereto, published with the Index and list of cases. The first column of this Table indicates the number of the section or rule illustrated by the case, (the rules being designated throughout by their marginal numbers), and the second column gives the page on which the case in question is to be found.

A VALUED correspondent sends us a letter from Nova Scotia referring to an article which appeared in these columns in last year's volume (p. 445), in reference to the removal of County Court Judges, giving a lengthy extract from an able judgment of Judge Savery on a kindred subject. Want of space prevents its insertion in this issue, but it will appear in our next. It has fallen to the lot of Judge Savery to adjudicate upon many important questions of constitutional law, and he seems to have devoted much attention to the difficult points which have arisen before him in this connection.

THE consolidation of the statutes of the Dominion will be a very arduous task, requiring in those to whom it may be entrusted a thorough familiarity with constitutional law, and with the various Provincial enactments which will necessarily enter into the labours of the Commissioners. It will probably be found desirable, should a joint commission be appointed, to have on it men from the principal Provinces; and probably one familiar with the laws of the several Maritime Provinces could be found to give valuable assistance to the Board on the questions that might arise peculiar to those portions of our Dominion.

IT is to be hoped that if the specially invited guests are to be formally received on their arrival at the approaching conversazione, the task of announcing them will be assigned to some one acquainted with their official titles. We remember hearing of a reception given to the legal dignitaries by the Lord Mayor at the Guildhall on one occasion, at which the Accountant in Bankruptcy and his wife were announced in stentorian tones by the flunkey at the en-

trance as the "Count and Countess of Bankruptcy," and had to parade up the hall to the Lady Mayoress under the embarrassing burden of this novel and unsought for title. We hope no one will have his democratic sensibilities shocked by any similar blunder on the forthcoming entertainment at Osgoode Hall.

A CORRESPONDENT of our namesake in England, speaking of the many hard cases resulting from breaches of trust and misappropriations by trustees, urges that some steps should be taken to provide for the safe keeping of trust deeds, and suggests tha they should be in the custody of some official. We do not see that this would prevent frauds by trustees; but it is plain that every precaution should be taken for the protection of beneficiaries. What might answer a better purpose, though the whole subject is surrounded by difficulties, would be for private trusteeship to cease, and have all trust estates of a certain character, or where a certain sum is involved, administered by official trustees, or at least that the latter should have some supervision for the protection of the *corpus* of the estate. It is, however, rather "too large an order" to speak of without full consideration, and after all, the multiplicity of the interests involved might prevent the possibility of moving in the direction indicated.

WE discuss elsewhere some important constitutional questions relating generally to the powers of the Local Legislatures in reference to the administration of justice, and with especial reference to a conflict of opinion in British Columbia which has come to a head in the following manner: It appears that the Provincial Legislature enacted that the Appellate Court should sit once a year on a day to be named by the Executive. The judges, on the day which had been named (Dec. 19), assembled, but not as a Court, taking the ground that the Local Legislature had no right of interference with the Supreme Court, that that tribunal had never been constituted, maintained, or organized by the Province, and that the B. N. A. Act had given to the Local Legislature the power to legislate in regard to civil procedure only as to those Courts which the Province constituted, maintained or organized. It was finally arranged that the question should be argued and put in such a shape that the point might go before the Supreme Court. The 5th of January was fixed for the argument. There has been much friction for some time between the Provincial Executive and the judges. We trust, whatever may be the result of this discussion, that the independence of the judges may be kept inviolate.

ADMINISTRATION OF JUSTICE IN BRITISH COLUMBIA.

British Columbia, which has attracted so much attention in Canada Pacific Railway matters of late years, bids fair once more to come to the front; but this time with grave constitutional questions respecting the administration of justice in the Provinces under the British North America Act 1867.

These will have some bearing on the Superior or Supreme Courts through the rest of the Dominion; and, being also unconnected with politics, will no doubt possess considerable interest for our general readers.

The subject now raised for judicial decision in our Pacific Province is the nature and extent of the power of the Local Legislature over the Supreme Court and Judges of British Columbia, the residential unity of its Bench—its Procedure, Rules, and Costs, under the British North America Act 1867, the special terms with which British Colum-

bia joined the Union, and the Imperial and Colonial Acts and Orders in Council which consummated it.

The action in which these points have come up for judicial decision is "*The Thrasher Case*," (*Sewell and others* v. *two B.C Towing Companies*,) in which the plaintiffs, an influential and wealthy American shipping firm, sought to recover $100,000 damages for the total loss of their ship the *Thrasher*, by alleged negligence on the part of the tugs. They had, under section 6 of The Dominion Superior Court Amendment Act, gone direct to the Supreme Court at Ottawa, to appeal against the decision of the Chief Justice at Nisi Prius at Victoria, and because the Lieut.-Governor in Council, (or, as they construe it, the Local Government) after proceedings commenced and plea pleaded under a set of rules which allowed an appeal to a Court of final resort in the Province, had passed rules which practically denied them that remedy, the Supreme Court at Ottawa sent the plaintiffs back to Victoria to use every effort to obtain the judicial decision of at least a plurality of British Columbia Judges, on a motion for a new trial, before they could assist them. Practically, this was to test the validity of the B. C. Rules of Court, referred to in the direct application at Ottawa.

It will be impossible to give our readers, even approximately, a clear idea of the position of affairs which brought about this result, without entering into a short history of the origin, progress, and present position of B. C. Supreme Court, and somewhat also of the B. C. County Courts. We have before us the judgment of the Supreme Court Judges of B. C. in a murder case, *Regina* v. *McLeans & Hare*, in a report carefully prepared from the judges' notes, and published at Victoria by the Honourable Mr. Justice Crease in 1880. This gives much information with respect to the B. C. Courts. So little is known of our western sister, owing to its distance and youth, that we have obtained such further information as we could procure on the subject. This we propose to give to our readers, not, of course, guaranteeing perfect accuracy in all respects; but under the conviction nevertheless that it will on examination be found to be very generally correct.

The Supreme Court of British Columbia, we learn, occupies apparently a somewhat exceptional position among the Superior Courts in the other Provinces of this, our new Dominion. It is represented in this judgment as being the heir of all the powers and all the privileges of the former Supreme Court of Civil Justice of the mainland of British Columbia, and the Supreme Court of Civil Justice of Vancouver Island. The former of these by an early ordinance, long out of print, almost out of personal memory, was especially invested by name with the criminal jurisdiction of the Queen's Bench, and by a subsequent ordinance, 5 June, 1859 (B. C. Con. Stat. No. 51), had "complete cognizance of all pleas and jurisdiction in all cases, civil as well as criminal, arising within the colony," and this without qualification or reserve. By the proclamation (having the force of law) of 19 Nov., 1858, (for the mainland alone) and by the ordinance of 1867, (Consol. Stat. c. 103), the civil and criminal laws of England, as they stood on the 19 Nov., 1858, are now in force in the whole of British Columbia, save where they are from local causes inapplicable, or have been altered, since 1867, by competent legislation. This includes statute as well as common law, and practice as well as doctrine.

In the various political changes which led to the union of the two formerly separate colonies of British Columbia (Mainland) and Vancouver Island into one colony by the name of British Columbia, all those powers appear to have been enlarged rather than abridged. No single one was taken away, but one by one they were gradually all accumulated, and at last, by statutes framed directly under the eye and order

RECENT DECISIONS.

Before proceeding to deal with the December numbers of the Law Reports, it is well to observe that the decision of Kay, J., in *Shardlow* v. *Cotterell*, noticed in the article on Recent Decisions in our last issue, has since been over-ruled by the Court of Appeal, as appears from the Weekly Notes for December 17th. The Court (Jessel, M.R., and Baggallay and Lush, L. J J.) held that the receipt and memorandum taken together without the poster contained a description sufficient to satisfy the Statute of Frauds. A full report of the judgments will no doubt appear shortly.

The December numbers of the Law Reports consist of 6 App. cas., p. 657 to p. 904, —7 Q.B.D., p. 501 to p. 619,—6 P.D., p. 125 to p. 156, and 18 Ch. D., p. 297 to p. 710.

EVIDENCE OF OWNERSHIP.

In 6 App. cas. it may be worth while to notice a dictum of Lord Selborne, L.C., at p. 694, that "payment to occupiers, however it might be explained, would certainly not be evidence of the purchase of the fee-simple for a perpetual rent-charge from the owner."

MORTGAGE—CONSOLIDATION.

And we can then proceed to *Jennings* v. *Jordan*, p. 698. In this case the mortgagor of one property had assigned the equity of redemption, and afterwards mortgaged another property to the mortgagee of the first, and the question before the House, as stated by Lord Blackburn, p. 714, was, "whether where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two."

Lord Selborne, L.C., in his judgment discusses the doctrine of consolidation in its various branches, and points out that the contention of the mortgagee in the present case went further than either justice or authority warranted, for that (p. 702), "it is against all principle that a vendor should be enabled, after parting with his whole interest in particular property, to impose an additional burden upon it without the purchaser's consent, not by any express contract (which might in some cases prevail, if protected by a legal estate without notice), but indirectly, and without any contract at all." If *Tassel* v. *Smith*, 2 De G. & J. 713, could rightly be regarded as an authority in favour of the mortgagee, the Peers refused to follow it. Both Lord Selborne and Lord Watson express doubts as to the equitable character of the considerations which have led to the growth and development of the doctrine of consolidation, as against purchasers of the mortgagor's equity of redemption.

DEPOSIT OF TITLE DEEDS WITH BANK—VENDOR AND PURCHASER.

The next case, *London and County Banking Co.* v. *Ratcliffe*, p. 722, is also connected with the law of mortgage. The owner of land, after depositing the title deeds with a bank, as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted, with the knowledge of the bank, to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account, at the bank, sums, which, in the whole, exceeded the debt due to the bank, on his balance, at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer., 585), that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money, by instalments, to the vendor, and the House of Lords held, affirming the decision of the Court of Appeal, that, (1) on the principle of *Hopkinson* v. *Rolt*, (9 H. L. C., 514),

the bank had no charge on the land as against the purchaser, for the fresh advances; and (2) that the bank had no charge upon the purchase-money. When, says Lord Selborne, p. 727, the mortgagor exercised, with notice to the mortgagee, his undoubted right of selling, subject to the then existing charge of the bank, "a line was, in my opinion, drawn, which was applicable to the security as a whole; and the bank could not make further advances so as to prevent or intercept (without any new agreement with B. [the vendor] or any notice to the respondent [the purchaser] beyond that which he had of the original security), the fulfilment, in the ordinary course, of the terms of the contract between B., as vendor, and the respondent, as purchaser." And Lord Blackburn, p. 739, states generally, that a purchaser of land, with notice that the title deeds have been deposited with a bank, as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has, after notice of the purchase, made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien, to give the purchaser notice that it has so done or intends to so do.

RIGHT TO LATERAL SUPPORT—PRESCRIPTION ACT.

By far the greater part, however, of this number of the appeal cases is taken up by the great case of *Dalton* v. *Angus*, in which the whole subject of the right to lateral support from adjoining land, its nature and acquisition, is exhaustively discussed. The point actually decided in the case is that a right to lateral support from adjoining land may be acquired by 20 years' uninterrupted enjoyment for a building proved to have been new built, or altered so as to increase the lateral pressure, at the beginning of that time; *and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.* The case was twice heard in the House of Lords, the second time in the presence of the following judges: Pollock, B. Field, Lindley, Manisty, Lopes, Fry and Bacon, J.J., to whom a series of questions were put. All we can do is to take the two principal questions and very briefly note some of the contents and conclusions arrived at, in the elaborate opinions and judgments with reference to them. The first question was:—

(1.) Has the owner of an ancient building a right of action against the owner of lands adjoining, if he disturbs his land so as to take away the lateral support previously afforded by that land?

All the judges answered this question affirmatively. Pollock, B., said: "It appears to me that by a long series of decisions, and by the opinions expressed by learned judges, during a period extending over very many years, the common law affecting this question must be taken to have been settled in favour of the right. The right to lateral support of soil by adjoining soil, is a natural right which exists wherever the lands of adjoining owners are in contact. The grounds upon which it is based are fully explained in the cases of *Humphries* v. *Brogden*, 12 Q.B. 739, and *Rowbotham* v. *Wilson*, 8 E. & B. 123. Where the soil is encumbered by buildings, it is obvious that a different question arises, although the character of the rights when acquired is in each case the same." He then proceeds to notice those cases and *dicta* which in his judgment establish the conclusion at which he had arrived. Passing on to consider the nature of the right to the support for a house and the mode by which it may be acquired by law, he defends, both on principle and authority, the view that it "must be taken as a rule of law not resting upon fiction or upon implied grant, but as a right of property, viz., an enjoyment of support which after twenty years becomes indefeasible in the same manner as the occupier of land may, by

bare possession for a sufficient period of time, acquire a good title." At p. 749 he observes that so far as the right gained by prescription for ancient lights affords any analogy, it is in favour of the view that the right for the support of a house may be obtained without any actual acquiescence by the owners of the adjoining land.

Field, J., in supporting the same view, discussed very loudly the manner in which the right arises, saying, p. 756, "Whatever may be the correct view as to the origin of the right, all the authorities seem to agree that after 20 years' enjoyment, the right is acquired; in the one case, the view being that it arises from a presumption of origin by grant, to be made in each particular case, from long uninterrupted possession; in the other case, that it has become an universal settled rule of law that the open enjoyment uncontradicted and unexplained, is sufficient by itself, and that there is, in modern times, at least, no necessity for presuming, in each particular case, a thing which everybody knows is a mere fiction. That in any view the enjoyment must not be "clam" is clear; for to hold that a man is bound by a right of the growing acquisition of which he had neither knowledge, nor the means of knowledge, would be unjust and inequitable." He discusses the right, in connection with other rights of a more or less analogous character, dividing the authorities into four classes, according as they relate to (1) vertical or lateral support of land or buildings; (2) light and air; (3) water; (4) way or common, or rights of that nature. As to the first two classes, he deduces from the authorities the conclusion, that the *de facto* enjoyment is the origin of the respective rights. As to the third class, he says, p. 759, that cases of percolating water were greatly relied on, in the argument, as shewing that no right at all could exist in the case of support; one of the reasons given for not implying any grant in those cases being, that there could be no resistance on the part of the servient owner. But, he says, he conceives the principle which underlies all these cases to be that, until defined and confined, there is, in those cases, as in light and air in its natural state, no subject matter capable of being the subject of a lawful grant, nor from the very nature of them can there be any definite occupation or enjoyment. As to the fourth class, he says the distinction between such easements and the right to air and light and support, is, that the former are unlawful in their origin. The first of the acts is a trespass; whereas in the case of the latter, the acts are in themselves lawful acts, done in the lawful occupation and uses of a man's own land.

Manisty, J., at some length defends the view that the right to the lateral support for buildings from adjacent soil is not a right to an easement, but a right of property, but he says, no doubt for many years the right was considered and treated as a right to an easement, and consequently in order to maintain the right the fiction of a lost grant was resorted to.

Fry, J., in a lengthy judgment maintains that, in the matter of this right, as acquired otherwise than by actual contract between the parties, principle and authority are in direct opposition to one another; that on principle it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors, for the only principle on which rights of the kind in question can be acquired is that of acquiescence, but he who cannot prevent cannot acquiesce; yet the authorities show that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and consequently, that the right is one which may be acquired independently of express covenant.

Passing now to the Peers, Lord Selborne takes a view as to the point raised in the first

question in favour of the right that regards it as an easement. "Land," he says, p. 792, "which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has granted a right of support to buildings," and at p. 796 he says:—"The policy and purpose of the law on which both prescriptions and the presumptions which have supplied its place, when length of possession has been less than immemorial, rest would be defeated, or rendered very in, secure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be conveniently practicable"

Lord Penzance also holds reluctantly in favour of the right, agreeing with Fry, J., that the circumstances under which the claim is held to arise are incapable of giving rise to it in accordance with any known principle of law. "It is this sudden starting into existence of a right," he says, p. 803, "which did not exist the day before the twenty years expired, without reference to any presumption of acquiescence by the neighbour, (to which the lapse of that period of time without interruption on his part might naturally give rise), which I find it impossible to reconcile with legal principles."

Lord Blackburn expresses his agreement with the result at which the judges had arrived, that the right claimed was, according to the established law of England, one which might be acquired by prescription. At p. 817 he expresses his disagreement with the view that acquiescence or laches is the only ground on which prescription is or can be founded. He then proceeds to discuss this with the greatest elaboration, and at p. 818 he quotes the passage from Dig. lib. 41, tit. 3—"Bono publico usucapio introducta est ne scelicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium," and says (p. 826) that if the motive for introducing prescription is that given in the above passage of the Digest, it seems to follow irresistibly that the owner of a house, who has enjoyed the house with a *de facto* support for a period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support; and should not be deprived of it by showing that it was not originally given to him.

Before quitting this first portion of *Dalton* v. *Angus*, it may be observed that the right to support for *soil*, which is a right *ex jure naturæ*, was illustrated by the case of *Snarr* v. *The Granite Rink Co.*, recently heard before Ferguson, V.C., in the Cancery Division, but not yet reported.

The second question put to the judges in *Dalton* v. *Angus* was as follows:

(2.) Is the period during which the plaintiffs' house has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient? The evidence showed that since 1849 there had been no alteration in the plaintiffs' premises, but that in that year their predecessor openly, notoriously, and without concealment, converted the same into a coach factory, in which their business had been since that time so openly carried on.

It was agreed on all hands that this second question should also be answered in the affirmative. Pollock, B., says, p. 751—"The presumption arising from 20 years' enjoyment cannot, no doubt, be treated as conclusive, that is, as a *presumptio juris et de jure*, which is not to be rebutted by evidence; it is conclusive only when the evidence of enjoyment is uncontradicted and unexplained. Thus it might be shewn that no grant could have been legally made

by the owner of the servient tenement . . . . In the present case, however, no evidence appears to have been offered on the part of the defendants to contradict or explain the user by the plaintiffs which ought to have been submitted to the jury. For the reasons which I have already given, evidence which merely shewed that there had been no actual acquiescence by the defendants would have be irrelevant."

Lindley, J., says, p. 766, "The only way in which I can reconcile the authorities on this subject is, to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved, the right will be acquired as against an owner in fee of the servient tenant, unless he can show that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right."

Fry, J., propounds his opinion, p. 773, that the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence; he then proceeds to consider of what ingredients acquiescence consists, and how the true grounds and principles of acquiescence can be applied to the question of the right of a house to be supported by the adjoining land. He observes that the authorities show that some notion of acquiescence was in the minds of the learned judges in establishing the existence of the right, but that he regards the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for their existence.

Bowen, J., maintains that there is no reason why, in the case of support to buildings, the same doctrines should not regulate the quality and nature of the user required, as apply to the mode of acquisition of affirmative easements and of light, *e. g.*, that the user should be open and uninterrupted. But he agrees that the period during which the house had stood was sufficient to give the plaintiff the same right as if his house was ancient, provided the engagement fulfilled the conditions, and provided it was not shewn by the defendant that the right had no lawful origin.

Lord Selborne, L. C., expressed his divergence from all the Judges before whom the case had come (see per Lindley, J., p. 764) by holding, that, inasmuch as he regarded the right of support as an easement not purely negative, capable of being granted, it followed that it must be within the 2nd section of the Prescription Act, Imp. 2 and 3 Will. IV., c. 71, (R. S. O., c. 108, sec. 35), unless that section is confined to rights of way and rights of water, which he did not believe it could be without unjustifiable violence to the express terms of the Act; but he says, p. 801, if the Act does not apply, the same result would practically be reached by the doctrine, that a grant, or some lawful title equivalent to it ought to be presumed after twenty years' user.

(3.) The third question put before Judges was as follows:—

"If the acts done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the defendants, or their predecessors in title, had knowledge or notice of those alterations, in order to make the damage done by this act in removing the lateral support, after the lapse of 27 years, an actionable wrong?

As to this, we have only space to say that the general opinion of the judges and peers seems embodied in the words of Bowen, J., at p 789, viz., "It was necessary to prove that the plaintiff had openly enjoyed the additional support rendered necessary by his alterations. It would, of course, be an open

enjoyment if the defendants or their predecessors in title had express knowledge or notice of the alterations and of their character. But the enjoyment of the additional support would also be open, if the appearance of the altered building was such as to afford a reasonable indication to the adjoining owner of the alterations that had taken place. Except to this extent, it was not necessary, in my opinion, to prove either knowledge or notice to the adjoining owner."

TRUSTS—SEVERANCE OF FUNDS FOR INVESTMENT.

Of the remaining cases in this number of Appeal Cases, the only one which need be noticed is *Fraser* v. *Murdoch*, p. 855, which was a case concerning the severance of funds for investment for behoof of distinct parties. The trustees sought to indemnify themselves for payment of calls made upon them by an insolvent bank (in which they had invested part of the money), out of the whole trust estate. But it was held that they had the power to sever, and had severed, the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore had no right to relief from liabilities incurred in the manner described.

It is necessary to postpone any notice of the remaining numbers of the December Law Reports until our next issue.

LAW SOCIETY.

The following are extracts from the proceedings of the Benchers in Convocation during last Michaelmas Term :—

RULE FOR THE ESTABLISHMENT OF A LAW SCHOOL.

1. The Law Society hereby establishes a Law School for the period of two years.

2. The Staff of the Law School shall consist of four Lecturers, who shall be Barristers-at-Law.

3. The course in the School shall consist of Lectures, Discussions, and Examinations, between the 12th December and the 1st May, during the first term thereof, and the 1st October and the 1st April, during the second term thereof.

4. The attendance in the School shall be voluntary, the students will be divided into the Junior and Senior class. Any Student or Articled Clerk, not being a University graduate, who shall not have entered his fourth year before the commencement of any term of the School, shall be entitled to admission to the Junior Class, and every University graduate, being a Student-at-Law or Articled Clerk, and every other Student-at-Law and Articled Clerk who shall have passed through the Junior Class or entered his fourth year before the commencement of any term of the School, shall be entitled to admission to the Senior Class.

5. At the end of each term an examination shall be held by the lecturers upon the subject of the lectures.

6. The duties of the Lecturers shall be to deliver *viva voce* lectures, to prepare all questions for Law School Examinations, whether oral or written, to select all questions for discussion, to preside in turn at meetings for discussion, unless other arrangements be made by the Committee on Legal Education, and to attend all Law School Examinations and report the results thereof to Convocation.

7. The Legal Education Committee shall arrange the subjects and books for lectures, the branches to be treated upon by each lecturer, the days and the hours for holding lectures and discussions in the Law School during the term, and shall provide as far as practicable for the delivery of additional lectures by Judges, Benchers and other members of the Profession, and shall have power from time to time to sanction any change of duty among the lecturers.

8. The Examiners in Law shall, until otherwise ordered, be the Lecturers in the Law School, and their salaries shall be $200 per annum each, in addition to their salary as Examiners in Law, such salaries to be paid quarterly.

9. The Lecturer, for the time being, holding the position of Seniority at the Bar shall be the Chairman at the Law School.

each of the reporters for decisions on matters of practice shall be three hundred dollars per annum.

Repeal Rule 114, and substitute the following therefor :—The salaries of the respective reporters shall be payable monthly, but not without a certificate of the Editor that the work of the reporter has been done to his satisfaction.

Repeal Rules 143 to 149 inclusive, and substitute the following therefor :—143. It shall be the duty of the Editor to determine what decisions ought to be published, to peruse and settle the reports thereof prepared by the reporters, and to superintend the preparation and publication of such decisions. He is also to make such arrangements with the Judges and Officers of the Courts that a report of all important decisions may be secured to the profession ; and he shall oversee the whole work of reporting, so as to ensure its efficient and prompt execution.

144. It shall be the duty of the reporters to attend their respective courts personally, and to prepare a report of each important, case including the arguments of counsel, the authorities cited, and the judgment, whether oral or written, and to furnish the same without delay to the Editor.

145. It shall also be the duty of the reporters, under the direction of the Editor, to deliver the reports in fair, legible manuscript to the printers, to read and correct the proof, and to see them through the press with despatch.

146. It shall also be the duty of the reporters to prepare and furnish short notes of all important decisions for early publication, under such regulations as may from time to time be made by Convocation.

147. Every report shall state the short style of the action or proceeding, the judge or judges who presided, the counsel and solicitors for the parties, and the date of the argument and of the judgment.

148. The Reports shall be issued in three series, in volumes to be numbered consecutively. The first series shall consist of decisions of the Court of Appeal, and shall be called the "Ontario Appeal Reports." The second series shall consist of decisions of the High Court, and shall be called the " Ontario Reports," and the third series shall consist of decisions in the Court of Appeal, and in the High Court on questions of practice, and shall be called " The Ontario Practice Reports."

149. The Appeal and Practice Reports shall respectively be issued, as nearly as possible in monthly numbers, and the Ontario Reports in semi-monthly numbers; but so as no case shall remain unpublished for more than two months after judgment, and the volumes shall be of the same size and in the same style as heretofore with index and digest.

149 (a). The Editor and reporters shall also, if and whenever required by Convocation, prepare and publish decisions in contested election cases, under such regulations as may from time to time be made by Convocation.

149 (b). The Editor and reporters shall also prepare and publish a triennial digest of the reports published by the Society, including appeals to the Supreme Court and the Privy Council from Ontario. The materials for the digest shall be prepared *pari passu* with the reports, so that it may be published promptly at the end of each triennial period.

Add the following section to Rule 156. (11). By paying fifteen dollars to the Secretary during the Michaelmas term of any year, any Student or Articled Clerk shall become entitled to receive the numbers of the Ontario Reports, the Ontario Appeal Reports and the Ontario Practice Reports published by the Society during the ensuing year, in the same manner as members of the profession.

The Rules were read a first time—

Ordered, That they be read a second time on the second day of next term.

LONG VACATION.

Resolved, That, in the opinion of the Benchers of the Law Society, it would be a very great benefit to the Legal Profession to have the Summer Vacation commence on the first day of July and end on the first day of September, and that there should be a Christmas Vacation, to commence on the 23rd of December and end on the 6th of January, and that a copy of this resolution be sent to the Chief Justice of Ontario, and to the Presidents of the Queen's Bench, Chancery, and Common Pleas Divisions of the High Court of Justice.

CANADA REPORTS.

ONTARIO.

CHAMBERS.

PAGE v. PROCTOR.

Witness Fees—Con. Stat. Can., cap. 79, sec. 8.

A certificate under the above section will not be granted unless the conduct money has been tendered to the witness at the time of service of subpœna upon him. Is it not sufficient that he received unused fees for a former trial which did not take place.

McPhillips moved, pursuant to sec. 8, C. S. C., ch. 79, for a certificate, that one Cox, who had been duly served in the Province of Quebec with a subpœna, to attend and give evidence upon the trial of this cause, at Toronto, had not appeared according to the urgency of the writ, but had made default, &c.

It appeared that the witness had been served with a subpœna to attend the trial at a former assize, at which the case did not come on, and he did not attend, having been duly notified not to do so. He had then been paid a sufficient sum for his conduct money.

On being served with the subpœna on the present occasion, he admitted to the person who served it the receipt of the money so paid, and that he had not attended upon the subpœna, and he made no objection to attending, on the ground of non-payment of conduct money with the subpœna now served.

OSLER, J.—This is a matter which concerns the liberty of the subject, and however unreasonable the conduct of the witness may have been, I think I am precluded by the express terms of the 9th sec. of the Act, from granting the certificate moved for. That section enacts that no such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial . . in obedience to any such subpœna, etc., unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person *at the time* when the writ of subpœna, &c., was served upon him.

The money which had been paid to the witness, with the former subpœna, was a debt due by him to the plaintiff, recoverable as such in the ordinary way, and may no longer hav been available to defray the witnesses' travelling expenses upon the sudden call of a subpœna. I think, at the very least, he should have been asked whether he required the fees to be again paid to him, or if he would treat those already paid as sufficient for the present emergency. Something of that kind ought to be deemed equivalent to a tender, although I am not prepared to say what an actual tender must not, in any case, be shewn under the statute, in order to punish the party for a contempt.

The matter mast be passed upon by the Quebec Court, and it would be extremely unsatisfactory if that Court should decline to act upon our certificate, because, in the opinion of such Court, nothing less than actual tender would do.

I shall be quite ready to re-consider the question, if it should come before me in the full Court; but as it strikes me at present, the motion must be refused.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO. DECEMBER 24, 1881.

GOODALL v. SMITH.

Sale of Goods—Waiver of Condition.

The defendant at Toronto having by telegram and letter offered the plaintiff at Landsdowne twelve carloads of barley, f. o. b. at Toronto, at 60c. per bushel, of the quality of barley previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Landsdowne, the plaintiff answered by telegram, "All right; will take the lot. Ship one car on receipt, quick." The car was sent by defendant, as well as several other cars, all of which were paid for. The defendant, however, still asked for inspection, but the plaintiff did not inspect.

The defendant subsequantly refused to deliver the remainder of the twelve cars except at an increased price, the rates for freight having advanced.

Held, that the contract was subject to the plaintiff inspecting before shipment, and that the shipment of the one car was not a waiver of the condition for inspection at Landsdowne of the balance, and that defendant was not, therefore, bound to deliver.

CAMERON J., dissented.

Bethune, Q.C., for plaintiff.

W. H. P. Clement, for defendant.

VETTER v. COWAN.

Writ of Capias—Ont. J. Act.

It is not necessary that an action should have been already commenced by writ of summons, before the issue of a writ of capias, which is not affected by the Judicature Act.

Shepley, for defendant.

Aylesworth, for plaintiff.

COMMON PLEAS DIVISION.

RE WIDMEYER v. MCMAHON.

Division Courts—Jurisdiction—Married woman—Separate estate—Title to land.

The plaintiff sued upon a promissory note for $176.44, payable with interest at 10 per cent., the principal and interest amounting together to $185.65.

Held, following *McCracken* v. *Creswick*, 8 Prac. R. 501, that under the Division Court Act 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of the defendant, and the above claim would therefore be recoverable in a Division Court.

In an action against a married woman the obligation on the part of the plaintiff to prove that she is possessed of separate estate does not, when it is shewn that she is possessed of such estate, necessarily bring the title thereto in question, so as to oust the jurisdiction of the Division Court. At all events the possession of separate personal estate is sufficient to enable a permanent judgment to be given; and although the absence of proof of any personal estate may be urged as a ground of defence, it does not oust the Court of jurisdiction.

Aylesworth, for the plaintiff.

Holman, for the defendant.

THE EXCHANGE BANK v. STINSON.

Chose in action—Action by assignee—Set-off.—R. S. O. ch. 116, secs. 7, 10—Judicature Act, secs. 12, 16, Rule 127.

Held, that to an action by an assignee of an account for the price of timber and staves delivered by the assignor to the defendant, under two certain contracts therefor, the defendant, under the Act relating to assignments of choses in action, R. S. O., ch. 116, secs. 7, 10, and the Judicature Act, secs. 12, 16, and Rule 127, can set up a claim for damages for the non delivery by the said assignor to the defendant of certain other timber and staves specified in the contracts.

In this case, the learned Judge at the trial having refused to entertain such defence, a new trial was ordered.

Falconbridge, for the plaintiff.

McCarthy, Q. C., for the defendant.

JONES v. DUNBAR.

Principal and surety—Notice—Evidence.

Held, that when sureties for a debt give to the creditor a second mortgage on land as additional security, on foreclosure proceedings being taken by the first mortgagee, the creditor, on being notified thereof, must either make himself a party to the suit and prove his claim, or give notice to the sureties of such proceedings, to enable them, if they so desire, to prove at their own expense; but *held*, that the evidence set out in the case showed that the sureties had notice, and even if they had not notice before the foreclosure decree was made, they had such notice some three months before the day of payment, that such decree had been made.

The evidence showed that one of the alleged sureties, H., originally occupied the position of a principal debtor. *Held*, that the fact of his changing his position as between his co-debtor and himself could not affect the creditor.

The other surety, D., admitted his liability as

a principal debtor to a portion of the debt, and set up as a defence in substance that he could not be called upon to pay until and unless the creditor executed a proper release, not only of the money then paid, but of anything else arising out of the claim.

Held, clearly no defence.

Guthrie, Q.C., for the plaintiff.

Macdonald (of Guelph), for the defendant.

COURT v. SCOTT.

Foreign judgment—Cause of action—22 Vict., ch. 5, sec. 58—Defence on merits—Jurisdiction.

Under 22 Vict., ch. 5, sec. 58, consolidated in C. S. L. C., ch. 83, sec. 65, sub-sec. 2, a judgment may be recovered in the Province of Quebec, on a personal service in Ontario in a suit or action, in which the cause of such suit or action arose in Quebec, so as to render such judgment conclusive on its merits.

A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C., ch. 57, sec. 4, is payable at the particular place named, the C. S. U. C. ch. 42, requiring the use of the restrictive words, nor otherwise or elsewhere, applying only to notes made and payable in Ontario.

The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal and there held until maturity, when it was presented for payment and payment refused.

Held, that the contract being performable in Quebec and the breach occurring there, the cause of action arose there, so as to bring the defendant under the operation of the 22 Vict., ch. 5, sec. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on its merits.

In an action brought here on such judgment, the defendant was held precluded from setting up any defence on its merits, the only defence allowed being one in the jurisdiction of the Court.

Semble, that personal service referred to in R. S. O., ch. 50, sec. 145, refers to personal service in the Province of Quebec.

Maclennan, Q.C., and *Langton*, for the plaintiff.

Snelling, for the defendant.

MERCHANTS BANK v. CAMPBELL.

Execution against lands—Sale—Sheriff's fees—Poundage.

Held, (WILSON, C. J., dissenting,) that a sheriff has no right to poundage upon an execution against lands, unless there has been an actual sale.

Bethune, Q. C., and *Allan Cassels*, for the sheriff.

Walter Read, contra.

GREAT WESTERN RAILWAY CO. v. LUTZ.

Ejectment—Proof of title—Possession—Evidence.

Where land was taken by the Great Western Railway Company, for the purpose of the railway, under the Act 9 Vict., ch. 81, sec. 30, and 16 Vict., ch. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove a strict legal right by conveyance from the patentees to the grantors.

In this case the defendant set up a title by possession, but his evidence failed to establish it.

Robinson, Q.C., for the plaintiffs.

Ewart and *Campbell*, for the defendant.

DUNBAR v. MEEK.

Sale of land—False and fraudulent representation—Adding parties.

Action for a false and fraudulent representation as to the boundary of certain land on the sale thereof, and for a rescision of the sale, and for an account for improvements, and for damages. It appeared that by partition between the defendant and his brother of a village lot acquired from their father, the defendant got the west half on which an hotel was erected, and the brother the east half, on which a store was erected, each believing that the division line between the two halves ran between the two

buildings. Subsequently the defendant sold the hotel property to the plaintiff, who had lived opposite thereto for some years, the defendant representing, as claimed by the plaintiff, that the division line ran between the buildings, which the defendant denies, whereas it appeared that the hotel encroached some 34 inches on the east half. There was evidence given to show that the plaintiff knew of the encroachment, and stated it made no difference as the matter could be settled; at all events that he knew of it before the deed was executed, when nothing was said about it, the land being described therein as the west half of the lot, according to a plan, and that plaintiff had given a mortgage on the land; that the value of the 34 inches was of trifling amount; that the hotel could be moved on to the proper line for $40; and that the defendant had offered to procure for plaintiff a lease of the piece encroached upon at a nominal rent for the time the hotel would last, which was refused. At the trial it was expressly found that the representation was not false and fraudulent.

Held, under these circumstances there could be no recovery.

At the trial an amendment was made, adding the brother as a party and directing him to make a conveyance to the plaintiff of the piece encroached upon.

Held, that amendment should not under the circumstances have been made, and must be struck out.

Dunbar, (of Guelph,) for the plaintiff.

Meyer, (of Orangeville,) for the defendant.

CHAMBERS.

Mr. Stephens.] [Dec.

WORKMAN V. ROBB.

Appeal—Time—O. J. A., sec. 38—R.S.O., cap. 38, sec. 46.

On the 2nd April, 1881, a decree was pronounced in this cause dismissing the plaintiffs' bill with costs. On the 9th April due notice of appeal was given by the plaintiffs, and about the same time an arrangement was made that the defendants' solicitors should accept the undertaking of the solicitors for the plaintiffs instead of the usual bond to secure the costs of appeal and of the Court below.

On the 8th September the plaintiffs' solicitors wrote to the defendants' solicitors, enclosing their written undertaking.

On the 1st October the defendants' solicitors in answer, wrote, declining to accept the undertaking, stating that he thought the plaintiffs were debarred, by lapse of time, of their right to appeal. Execution was issued on the 10th November against the goods and lands of the plaintiff for the amount of the defendant's taxed costs of suit.

The plaintiff then applied for an order to set aside the execution with costs.

Held, that the agreement between the solicitors applied only to the nature of the security to be given, and not to the time within which it was to be furnished. That section 38 of O.J.A. did not limit to three months the plaintiff's right to appeal within the twelve months which existed under R.S.O., cap. 38, sec. 46.

Executions set aside with costs to be costs to the plaintiff on the final taxation.

Costs in the appeal in any result of the appeal.

Hoyles, for the motion.

Cassels, contra.

Hagarty, C. J.]

REG. EX REL. WATT V. LANG AND CHADWICK.

Municipal Act, sec. 194.

Held, per HAGARTY, C. J., on appeal from Mr. Dalton, that a disclaimer by an Alderman elected in a city is sufficient under the above section, if made within the six weeks from election, although the person elected has acted in his office.

Mr. Dalton.] [Dec. 23, 1881.

CAMPAN V. LUCAS.

Replevin.

The Judicature Act does not in general apply to actions of replevin.

Holman, for application.

Aylesworth, contra.

Mr. Dalton.] [Dec. 29, 1881.

WALLACE v. COWAN.

Notice of trial—Replevin.

In an action of replevin ten days notice of trial must be given instead of eight days, as under the old practice; the ground of this decision being that under the wording of Rule 4 the new practice is introduced as to notice of trial in replevin.

Akers, for defendant.

Meek, for plaintiff.

Mr. Dalton.] [January.

LOWSON v. CANADA FARMERS' MUTUAL INSURANCE CO.

Insurance—Judgment—Certificate of Court of Appeal—Fi. Fa.

At the trial defendants succeeded, but afterwards the decision was reversed by the Court of Appeal, and a decree for plaintiff pronounced. Plaintiff issued execution upon the certificate of the Court of Appeal immediately after issuing the certificate.

Held, that execution could not issue upon such certificate, and that under R. S. O., ch. 161, sec. 61, execution should not issue until three months after judgment.

H. Cassels, for motion.

Cattanach, contra.

Cameron, J.] [January 5.

IN RE ENGLISH v. MULHOLLAND.

Prohibition—Division Courts—Title to land.

In an action in a Division Court to recover $79.50, the rent and taxes of certain land, certain facts as to the terms and conditions of the tenancy were disputed, but the defendant did not dispute the plaintiff's title. On plaintiff obtaining judgment for the amount claimed, defendant applied for a prohibition on the ground that the title to land was called in question.

Held, that the amount was properly recoverable in a Division Court.

English, for plaintiff.

Bigelow, contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

THE QUEEN v. HOLL.

Imp. Jud. Act 1873, *s.* 47—*Ont. Jud. Act. s.* 87, *O. No.* 484.

The decision of a Divisional Court discharging a rule for a mandamus to be directed to commissioners appointed to inquire into corrupt practices at a parliamentary election, ordering them to grant a certificate to a witness under s. 7 of Corrupt Practices Prevention Act, Imp. 26-27 Vict. c. 29, which certificate, if given, would be a protection to the witness against criminal proceedings for bribery, does not relate to a criminal cause or matter within Imp. Jud. Act, 1873, s. 47.

[June 30, C. of A.—L. R. 7 Q. B. D., 575.

The above head-note shews the decision on a preliminary objection taken to the hearing of the appeal in the above case.

Counsel for the respondents argued that a rule *nisi* was granted to compel the commissioners to give to the witness a certificate, which should indemnify him against criminal proceedings for bribery committed at a parliamentary election; and that it was therefore "a criminal cause or matter," within Imp. Jud. Act 1873, s. 47. They cited *Reg* v. *Steel*, L. R. 2 Q. B. D. 37.

BRAMWELL, L. J.—We all are of opinion that the present appeal does not relate to a "criminal cause or matter," and that we must hear it.

[NOTE.—*We have no section in our Judicature Act corresponding to s.* 47 *of the Imp. Act, but the case is noted for the same reason as the Queen* v. *Whitchurch, supra.*]

HARRISON v. CORNWALL MINERAL RY. CO.

Imp. O. 58, *r.* 6—*Ont. J. Act, s.* 39, *G. O. C. of App., No.* 16.

A respondent who has given cross notice of appeal under Imp. O. 58, r. 6, is in the same position as to costs as if he had presented a cross appeal.

Where there were two respondents to an appeal, one of whom gave cross notice of appeal affecting his co-respondent, the Court made an apportionment of the costs of the appeal.

[June 22, C. of A.—L. R. 18 Ch. D. 334.

This was an appeal from a decision of Hall, V. C., which was now substantially affirmed; but the contention raised by one of the respondents, on cross notice of appeal, was allowed. To understand the order as to costs, it is necessary to observe that *Medd* appeared for

the appellant, the defendant Fenton; *Pearson* appeared for the defendant Brassey, who had served cross notice of appeal, on a matter affecting his co-respondent; and *Kekewick* appeared for the plaintiffs.

JESSEL, M. R.—Under the present practice a notice is equivalent to a cross appeal. It is a mere accident whether Mr. Pearson's clients presented their appeal first, or Mr. Medd's client, because, if Mr. Pearson's clients had been first we should have got the notice from Mr. Medd's client, therefore there really is an appeal and a cross-appeal. I do not know how to divide the costs except equally. The result will be that the appellant, represented by Mr. Medd, will pay half the costs of all the respondents, and the respondents, represented by Mr. Kekewick, will pay the other half of the other respondents.

BAGGALLAY and LUSH, L.JJ., concurred.

[NOTE.—*Imp. O.* 58, *r.* 6, *is very similar to No.* 16 *of our G. O. Court of Appeal, which is incorporated into the new practice by Ont. Jud. Act, sec.* 39.]

PARKER v. WELLS.

Imp. O. 31 *r.* 19. *Ont. O.* 27 *r.* 17 (*No.* 235).

Where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree, but will only be of use to him, if he obtains a decree, the Court has a discretion, whether to oblige the defendant to answer it before trial, and will not do so where compelling such discovery would be oppressive.

[July 13, C. of A.—L. R. 18 Ch. D., 477.

The plaintiff, in this case, alleged that defendant E. held certain moneys which had been deposited with him in 1854, by G., in trust for S. and A. (deceased) successively, for their lives, and then for the plaintiff absolutely; but, that though E. paid the interest to S. and A., for their lives, he now refused to pay over the principal. E., by his defence, admitted the deposit, but denied the trust, and said he had only held the money for G. to draw upon, and had, many years ago, paid it away by G.'s directions; he denied payment of interest to S. and A.

The plaintiff delivered interrogatories, of which number 1 required E. to set out the dates and particulars of the payments made by him, out of the deposited sum; and number 3 required him to set out an account of all moneys paid by him since 1854 to S. and A., or either of them.

As to the 1st interrogatory, JESSEL, M. R., said:—A detailed account of the way in which the money was paid away will not help the plaintiff to prove the trust, and if she proves the trust, this detailed account is immaterial, since no payment made by the direction of G. would be a good discharge. The only use that could be made of the detailed discovery sought, would be to discredit the defendant's evidence, if he made any inaccurate statements, or failed to set out particulars. After this lapse of time, such a failure hardly would discredit him, and to require a man to go through his books for a number of years for such a purpose as this, would be oppressive.

As to interrogatory 3, he said:—An account of profits would not help the plaintiff to get a decree, and it would be oppressive to order it while the title of the plaintiff is in dispute. No inquiry is more difficult to work out than an inquiry that profits have been made by the employment of a particular sum of money in a business. . . It was urged by Mr. North, and I have often, when at the Bar, urged the same argument, that the defendant's answer may enable the plaintiff, if he succeeds, to get an immediate order for payment of the sum which the defendant admits; but that argument is worthless as regards such a point as this, for a defendant never makes such an admission of profits as the plaintiff could use for this purpose."

BRETT, L. J., said as to both interrogatories: "The answer to the interrogatories to which this appeal relates could not determine any issue in the action, and if they have to be given at all they ought not to be required to be given till after the issues have been decided."

COTTON, L. J., gave judgment to the same effect.

[NOTE.—*The Imperial and Ontario Orders are virtually identical.*]

CORRESPONDENCE.

Distress Clause in Mortgages.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—It appears that the case of *The Trust & Loan Co.* v. *Lawrason*, recently decided in the Court of Appeal, stands for argument in the Supreme Court. It is to be hoped that the position of several mortgages on the same property will be brought prominently to the attention of the judges. If a first, second, third and fourth mortgagee can, at the same time, be landlords of the same tenant, for the same lands, each armed with an independent power to distrain the goods of strangers, chattel property is exposed to a startling risk.

Perhaps the consideration of such a state of facts might assist in determining how far the purely feudal incident of distress can be annexed to a loan of money secured in any way whatever. The effect of attornment to several mortgagees, one after the other, would be well worth discussing.

Yours truly,

BARRISTER.

Canada Law Journal.

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DIARY FOR FEBRUARY.

1. Wed.... Final Examination for Attorney.
2. Thurs.. Final Examination for Call.
5. Sun.... *Septuagesima Sunday.*
6. Mon.... Hilary Sittings begin. Hagarty, C.J.,C.P., sworn in, 1856.
10. Fri. .... Queen Victoria married, 1840.
11. Sat. .... Lord Sydenham Gov.-Gen. of Canada, 1840. R. E. Caron, Lieut.-Gov. of Quebec, 1873.
12. Sun.... *Sexagesima Sunday.*
13. Mon.... Last day to move against Municipal Elections.

TORONTO, FEB. 1, 1882.

SIR GEORGE BRAMWELL, late one of the Lord Justices of Appeal, has been raised to the peerage under the title of Lord Edenbridge. As the *Law Journal* says:—He is a lawyer peer in the truest sense, having earned his honours solely through eminence as a lawyer and for past services."

SIR JOHN HOLKER, Q.C., who was Attorney General in the Beaconsfield administration, has been appointed by Mr. Gladstone to the seat rendered vacant by the death of Lord Justice Lush. He is a very able lawyer, and will it is believed be an ornament to the Bench.

SIR MONTAGUE SMITH, who was a paid member of the Judicial Committee of the House of Lords, has retired from the Bench. The vacancy thus created will not be filled, but instead, a Lord of Appeal in the House of Lords will be appointed. Sir Montague Smith was an eminent judge, with an acute mind, and a man of great learning. He entered the profession as a solicitor.

THE Taxing Masters will be both pleased and interested to hear that there is now judicial authority for the proposition that they exist for the purpose of being troubled. In the recent case of *Warner* v. *Mosses*, 45 L. T. N. S. 360, Lord Justice Brett observes: "Taxing Masters exist for the purpose of being troubled, just as Judges exist for that purpose; and therefore it is nothing to tell us that it will give the Master great trouble; we have no feelings about trouble. They must take the trouble; they must inquire in every case." There is a good honest ring about this, which no doubt will be appreciated even by Judges and Taxing Masters.

Two rather interesting letters on the subject of insanity as a defence and excuse for criminal action are published in a recent number of our contemporary, the *Irish Law Times*. One curiously enough is written by the late President Garfield to Judge R. F. Payne, with reference to a certain trial in which the latter charged strongly against the plea of insanity, and was read by Judge Porter at Guiteau's trial. It is as follows:—

"Dear Judge,—Allow me to congratulate you on your splendid charge to the jury at the close of the Gelentine case, The whole country owes you a debt of gratitude for brushing away the wicked absurdity which has lately been palmed off on the country as law on the subject of insanity. If this thing had gone on much further, all that a man would need to secure himself from the charge of murder would be to rave a little and tear his hair a little, and then kill his man. I hope you will print your excellent charge in a pamphlet form and send it to all the judges in the land."

The other betrays its authorship unmistakably by its style, and was originally written by Mr. Ruskin to the *Pall Mall Gazette*. Whether the sentiment is altogether commendable or not may be questioned, but at

all events, it shows an honest detestation of crime :--

"Sir,—Toward the close of the excellent article on the Taylor trial in your issue for October 31, you say that people never will be, nor ought to be, persuaded 'to treat criminals simply as vermin which they destroy, and not as men who are to be punished.' Certainly not, sir! Whoever talked or thought of regarding criminals 'simply' as anything (or innocent people either, if there be any)? But regarding criminals complexly, and accurately, they are partly men, partly vermin; what is human in them you must punish-- what is vermicular, abolish. Anything between—if you can find it—I wish you joy of and hope you may be able to preserve it to society. Insane persons, horses, dogs or cats, become vermin when they become dangerous. I am sorry for darling Fido, but there is no question about what is to become of him. Yet, I assure you, sir, insanity is a tender point with me. One of my best friends has just gone mad, and all the rest say I am mad myself. But if ever I murder anybody--and, indeed, there are numbers of people I would like to murder—I won't say that I ought to be hanged; for I think that nobody but a bishop or a bank director can ever be rogue enough to deserve hanging; but I particularly, and with all that is left me of what I imagine to be sound mind, request that I may be immediately shot."

PROCEDURE IN IMPEACHING RETURN TO MANDAMUS NISI.

Napanee v. Napanee.

The proper procedure to follow, if it is desired to impeach the return made to a mandamus nisi is a subject of some little complexity, and we propose briefly to discuss the matter. Formerly, if the return were good upon the face of it, but false in fact, the prosecutor had no means of traversing it, *and no remedy at all*, except by bringing an action on the case against the defendants for their false return; but if he succeeded in obtaining a verdict and judgment in that action, the Court then awarded a peremptory mandamus. But by Stat. 9 Anne. c. 20, sec. 2 (which related only to municipal offices and officers; but which has since been extended to writs of mandamus in all cases,—in England by Imp. 1 Wm. IV, c. 21, sect. 3, and here by 28 Vict. c. 18, sect. 3, now R. S. O. c. 52, sect. 11)—it is enacted that where a return has been made to a writ of mandamus, it shall be lawful for the prosecutor to plead to or traverse all or any of the material facts contained therein. The effect of the above mentioned more recent statutes has been to make this applicable to all cases, although an action for a false return might not lie at common law. (*R.* v. *Fall*, 1. Ad. & El. N. C. 647; Archbold, Cr. Pr., p. 301. Ed. 1844.)

On the other hand, if the prosecutor wished to object to the return for any inconsistency or other defect *appearing upon the face of it*, he used formerly to move for a concilium, and have the matter set down in the Crown paper for argument, when the Court decided upon it; and if they held the return to be bad, they ordered it to be quashed, and awarded a peremptory mandamus. In very plain cases they sometimes decided as to the sufficiency of the return upon a motion to quash it, (*R.* v. *St. Catharines' Dock Co.*, 4 B. & Ad. 360), but as the decision in these judgments was final, and no writ of error lay upon it, the practice was unsatisfactory. To remedy this it was enacted in England by Imp. 6 and 7 Vict., c. 67, sect. 1, and here by 28 Vict., c. 18, section 7, (now R. S. O., c. 52., sect. 15), that in all cases in which the prosecutor of a writ of mandamus wishes to object to the validity of any return made thereto,—"he shall do so by way of demurrer to the same in such and the like manner as is now practiced and used in the said Courts respectively in personal actions, &c." (Archb. Cr. Pr. p. 298). For, as recited in Imp. 6–7 Vict. c. 67, by neither of the former statutes was any power given to the prosecutor to *demur* to the return, so that the decision of the Court as to its validity could be reviewed by a Court of Error. It

was during this latter state of things and before the passing of the 25 Vict. c. 18, sect. 7 that *Reg.* v. *Wells*, 17 U. C. R. (1859) came before our courts. The defendant there demurred to the return, and moved to quash it, and the Court held (i.) that in this country there could be no demurrer to a return, the Imp. 6–7 Vict. c. 67 not being in force here, and (ii.) that the return was insufficient and must be quashed.

It appears from the above that in cases where the return was good upon the face of it, but false in fact, the prosecutor *never had a remedy on motion to quash for this reason:* on the contrary before Imp. 1 Wm. IV. c. 20, (Ont. 28 Vict. c. 18, sect. 3) he had in cases not included within 9 Ann c. 20, no remedy at all under such circumstances, except by bringing an action on the case against the defendant for their false return. Where, however, the return was objected to for any inconsistency or defect *appearing upon the face of it*, it appears that the Court did sometimes, *before* Imp. 6–7 Vict. c. 67, sect. 1 (Ont. 28 Vict. c. 18, sect. 7) in very plain cases decide upon the sufficiency of the return upon a motion to quash it. The question remains whether the Court still has the power to squash a return in such cases?

An application to quash a return to a mandamus nisi, as being on the face of it invalid and frivolous, inasmuch as the cause shown against the mandamus being made absolute, raised points of law already decided against the defendants on the application for the mandamus nisi,—recently came before the Chancery Division in the case of the *School Board of Napanee* v. *the Municipality of Napanee.* The mandamus nisi in this matter was granted by Proudfoot, J. on Nov. 16th ult. as noted in our number for Dec. 1st, p. 452. On Dec. 7th, as noted in our number for Dec. 15th, p. 474, an application was made before the same learned Judge to quash the return made by the defendants on the above grounds, but he refused the application with costs, holding that the mode of procedure, when a return has been made to a mandamus nisi and the plaintiffs are not satisfied with it, is to demur, plead to or traverse the return, to which the defendants may reply, take issue or demur. As appears from his notes, he cited 3 Bl. Com. 264. *Rex* v. *Borough of Lancaster*, 7 Dowl. & Ry. 708, (1826); and *Rex* v. *Payn*, 6 A. & E. 392 (1837). The object of citing the first of these cases was apparently to show that questions already determined on the application for the rule *nisi* may also be again discussed after a return is made. This is all that appears from the case as reported in 7 Dowl. & Ry., while it appears from the report of the same case in 4 B. & C. 876, note (a), that the Court did quash the return in this case, apparently on the ground that the point raised on the return had already been decided on the rule to show cause. But this case was decided in 1826, before either Imp. 1 Wm. IV. c. 20, or Imp. 6-7 Vict. c. 67, and the case was not one that came under 9 Ann. c. 20, and therefore, so far as the question of quashing is concerned, it is no authority as to the present practice. In the other case cited by Proudfoot, J., *Rex* v. *Payn*, 6 A. & E. 392, the Court refused to quash the return. The reasons are not given, but in a subsequent application in the same case reported, 9 L. J. N. S. (Q. B.) 286, Lord Denman. C. J. is reported as saying: "In refusing to order the return in this case to be taken off the file, we did not mean to give any judgment as to its validity. The question before us was, whether it was evasive and frivolous, and that is all we intended to decide. The Court has undoubtedly the power to quash a return summarily on motion; and it is a power with which we do not intend to part; but where it merely decides that a return is not contemptuous, such a decision does not involve the consequence of a judgment on argument that it is good in law." And he held, on that occasion, that the prosecutors were still at liberty to traverse the facts of such return.

But it must be remembered that this case

of *Rex* v. *Payn* was decided in 1837, before the Imp. 6–7 Vict. c. 67 introduced the system by which a prosecutor demurs in such cases.

The passage in Blackstone, referred to by Proudfoot, J., is apparently contained in the last edition by Stephens, vol. 3, p. 617, but nothing is said there as to whether the Court will even now ever quash a return on motion, when insufficient in point of law. In Corner's practice, ed. 1844, p. 230, "it is apprehended that the power of the Court to quash a return of the description referred to," (*i. e.*, where it is clearly bad, or so evasive and frivolous as to amount to a contempt) "is not taken away by Imp. 6–7 Vict. c. 67." No cases are cited, however, to support this, nor is there anything to support it in Selwyn's N. P. ed. 1869, p. 1040 sq., where the procedure is discussed. Moreover neither does there appear to be in Fisher's Digest or elsewhere any English case since Imp. 6–7 Vict. c. 67, —nor in Robinson & Joseph's Digest any Canadian case since our 28 Vict. c. 18, in which a return to a mandamus nisi has been quashed on motion as deficient on the face of it,—and as above shewn it never could have been so quashed *as deficient in point of fact.*

Prima facie it would appear unlikely that after Imp. 6–7 Vict. c. 67 (28 Vict. c. 18 C.) the Courts would still quash on motion a return as insufficient on the face of it, for two reasons (i.) because 6–7 Vict. c. 67 specially recites that it was intended to remedy defects in the former procedure, and to enable the prosecutor to demur in such cases; and (ii.) because its language is peremptory, and says that in such cases the prosecutor *shall* demur.

It thus appears that there are three courses now eligible if a return is unsatisfactory :—

(i.) If the return is good upon the face of it, but false in fact, the prosecutor can—

(a) Bring an action on the case against the defendant for his false return; (as to which see Selwyn's N. P. ed. 1869, p. 1041;)

(b) Proceed under 9 Anne c. 20, sect. 2, as extended by R. S. O. c. 52, sect. 11, and plead to or traverse all or any of the material facts contained within the said return, etc.: (as to which see *ib.* p. 1043, and *Reg.* v. *St. Luke's Chelsea*, 5 L. T. N. S. 744.)

(ii.) If the return is defective upon the face of it he can demur under R. S. O. c. 52, sect. 15.

Thus in *Re Perth*, 39 U. C. R. 53,—a similar application for a mandamus to the one in the recent Napanee case—a mandamus nisi was granted in order "that the legal question involved might be formally raised by demurrer or plea," per Harrison, C. J.

What form the pleadings will take now in such cases still remains to be considered. R. S. O. c. 52, sect. 10, dealing with application for writs of mandamus on motion says that the preceding provisions of that Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by either of the Superior Courts of Law, which could, before the enactments giving a right to proceed by action for a writ, grant such writs.

Sect. 6 of the Act says: "the pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in any ordinary action for the recovery of damages."

But the pleadings in any ordinary action for the recovery of damages have been changed by the Judicature Act. (O. 15, r. 1), and there appears no specific provision as to these proceedings on the return to a mandamus nisi. It is true O. 58, r. 1, provides that nothing in these rules shall be construed as intended to affect the practice or procedure in Criminal proceedings on the Crown or revenue side of the Q. B. or C. P. Division. But it is a question whether the proceedings we are considering can be held any longer in this Province to be proceedings on the crown side of the Q. B. or C. P. Division. It has been held by Proudfoot, J., followed by the

present Chief Justice of Appeal, that the Court of Chancery has jurisdiction in these matters, since the administration of Justice Act (R. S. O. c. 49), as stated in the judgment on the application for the mandamus nisi in the Napanee case, (Ch. Div. Nov. 16, 1881); and in *Re Stratford & Huron Ry. Co.*, 38 U. C. R. 112 (1876) Moss, C.J., said the writ of mandamus was not invested with any prerogative character in this Province in his opinion: "It is not attached to any particular Court, but may issue out of either of the superior courts of common law." In England, on the contrary, it has been held that ever since the Judicature Acts an application for the prerogative writ of mandamus must be made to the Q. B. Division (per Brett, L. J. *Glossop* v. *Hesten*, L.R. 12 Ch. D. 102). The Master in Chambers, however, on Dec. 23 ult. held in the case of *Campan* v. *Lucas*, *ante* p. 42, that the pleadings in replevin were not altered by the Judicature Act, and probably on the same principle the special nature of the proceedings in the matter of a return to a mandamus nisi would be held to exclude them from this operation of the Act.

RECENT DECISIONS.

Proceeding with the December numbers of the Law Reports, we have now to deal with 7 Q. B. D. pp. 501-619; 6 P. D. pp. 125-156, and the very voluminous number of Chancery Division cases, 18 Ch. D. pp. 297-710.

CONTRACT.—DAMAGES.

In the first of these *Lilley* v. *Doubleday*, p. 511, requires notice. The defendant contracted to wharehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place, where without any negligence on his part, they were destroyed. The Court held that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of goods, For said Grove, J.—"if a bailee elect to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself." "*Hadley* v. *Baxendale*, 9 Ex. 341," said Lindley, J. "is wide of the mark, because the question here is whether the defendant was responsible for the goods, and if so the damages must be their value."

RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT.

Next we may mention *Wilson* v. *Strugnell*, p. 548. In this case a Justice of the Peace remanded a prisoner to the next meeting of of the Justices of the County, and admitted him to bail, taking the recognizance of the defendant in £100 for his appearance. The accused paid the defendant £100 to indemnify him against liability under the recognizances. The accused failed to appear, but the defendant's recognizance was neither forfeited or discharged, nor did he pay anything under it. In this condition of things the accused was adjudicated a bankrupt, and the plaintiff, as trustee, sued to recover the £100 from the defendant. Stephen, J., held that the money was paid in pursuance of a contract which was contrary to public policy, and as the contract had not been executed, the plaintiff was entitled to recover. All the cases, he said, are consistent and reducible to plain and familiar principles; "The principle is, that where money has actually been paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but that where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected;" and in this case, said he, "I do not think the matter can be said to have been fully completed until the same has been *actually and finally applied to the purpose of repayinng him for a loss actually sustained by him*" (the defendant).

PRODUCTION.

The next case, *Wilson* v. *Raffalovich*, p. 553, is on the subject of the production of documents, and seems an instance of *summum jus summa injuria*, though Cotton, L.J., declares (p. 560) that "no man can be said to suffer an injustice if, when he comes to sue in a Court, the rules of the Court applicable to suitors who seek to enforce their rights are enforced in his case." The facts were these —The underwriters, having paid R. & Co., the insured firm, for a total loss of cargo, commenced an action against the shipowners in the name of R. & Co., to recover the value of the goods. A *consent* order was made for an affidavit on production by the plaintiffs, and a further order having been made that both members of the firm of R. & Co. should put in a further and better affidavit, the solicitor of the underwriters deposed that the members of the firm of R. & Co. were abroad, and would not give any further discovery, and that the real plaintiffs had done all they could do to comply with the order. The Court of Appeal, nevertheless, held that the case must be treated as if the nominal plaintiffs on the record were suing for their own benefit, and that the making a further affidavit could not be dispensed with. This reversed the decision of the Court below, which had held that under the above circumstances the real plaintiffs ought to be relieved from the necessity of a further compliance with the orders, Pollock, B., observing that the defendants suffered no injustice, for that if the underwriters had taken an assignment and sued in their own names under the Jud. Act, 1873, sec. 25, sub-sec. 6 (of R. S. O., c. 116, sec. 7) no Court could possibly have made an order against them for production of documents not in the possession of themselves or their agents. The Court of Appeal, however, agreed in taking a different view. "It is the misfortune of the real plaintiffs," said Brett, L.J., "that, being obliged to bring the action in the name of the parties to the contract who are abroad, they cannot get those persons, in whose name they are bound to sue, to obey the procedure of the Court. It is a misfortune, but it may be a misfortune without a legal remedy. The order that the plaintiffs on the record should make the further answer is a proper order; they have not made that answer, and under those circumstances I think that the order made by the Divisional Court cannot be supported." Counsel for the respondent then asked that the words "plaintiff or plaintiffs" should be inserted in the order, but Cotton, L.J., said he thought this unnecessary, for that "if an attachment is moved for against the plaintiff who does not make an affidavit, and it is shown that he is not in a condition to make one, no Court will grant an attachment."

MANDAMUS—CONTROVERTED ELECTION ACT.

The next case it seems expedient to notice is *The Queen* v. *Hall*, p. 575. In this case the Court of Appeal held that where the Commissioners appointed to inquire into corrupt practices at a parliamentary election have, with reference to a witness before them on such inquiry, exercised their judgment as to the right of such witness to receive their certificate, designed to protect him against future consequences of answers to criminating questions, under sect. 7 of the Imp. Corrupt Practices Prevention Act, 26 and 27 Vic., c. 29, their decision refusing such certificate is conclusive, and cannot be reviewed by *mandamus*, thereby shewing a tendency to dissent from *Reg.* v. *Price*, L. R. 6 Q. B. 411. There is a very similar section in our Controverted Elections Act, R. S. O., c. 11, sect. 53. Our Act, however, seems to shew more clearly than the Imperial Act, that whether the witness has answered truly is for the discretion of the Court to decide. For it speaks of "full and true answers, *to the satisfaction of the judge or judges*," whereas the Imperial Act merely says that "where any witness shall answer every question," he shall be entitled to a certificate. Bramwell, L. J., says, p. 588, "It seems to me that this statute must be read: Provided always that where any witness

'in the judgment of the Commissioners or Committee,' and that those words must be put in. There is no one so reluctant as I am to put words into an Act of Parliament or into an agreement, and I think it would be altogether unreasonable to do so, except for the most cogent consideration, but I think such consideration exists here. It is quite certain that some words must be introdced into the Act." And at p. 588, Cotton, L. J., draws a distinction, saying, that under certain circumstances he thought the Court might interfere with the discretion exercised by the Commissioners; "if, for instance, it was admitted by the Commissioners that facts existed which would entitle the witness to a certificate, and they refused it, then they would not have exercised they discretion which in my opinion was given to them by this section. . . But in this case the Commissioners have come to the conclusion that the witness had not performed the condition necessary to entitle him to a certificate, and they have therefore declined to grant him one." Brett, L. J., draws the same distinction, p. 585.

REMOTENESS OF DAMAGES.

The next case, *McMahon* v. *Field*, is an interesting one on the question of damages recoverable. An inn-keeper after contracting to provide stabling for the plaintiff's horses, in breach of his contract, let his stables to another person. The latter turned out the horses, which had been put into the stables by the plaintiff, without their clothing, and the remained in the defendant's yard exposed to the weather for some time, until the plaintiff could find suitable stables for them elsewhere. Owing to this exposure several of them caught cold, which depreciated their value in the market. The Court of Appeal held that the damage in respect to such cold was recoverable, and it was the probable consequence of the defendant's breach of contract, and was not, therefore, too remote. Bramwell, C. J., though expressing doubts on the point, concurred with the other judges, saying: "Here the damage would not have happened if there had not been a breach of contract, and although that breach may not have directly caused the damage, yet it was the only event without which the damage could not have happened." Brett, C. J., says, p. 595:—"The question as to the remoteness of damage has become a difficult one since, according to the case of *Hadley* v. *Baxendale*, 9 Ex. 341, it is for the Court and not for the jury to determine whether the case comes within any of the following rules, viz.:—(i.) Whether the damage is the necessary consequence of the breach; (ii.) whether it is the probable consequence; and (iii.) whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury than of law for the Court to determine. Now the question in this case is whether the fact of some of these horses taking cold is within any of these rules. It was not the necessary consequence of the breach of contract, but I have no doubt that it was the probable consequence, and if so, it follows that it was in the contemplation of the parties within the meaning of the third rule." He also expresses some doubt as to the correctness of the decision in *Hobbs* v. *London and S. W. Ry.*, to L. R., 10 Q. B., 111 Cotton, L. J. observed: "It is said that the rule is that the damage to be recoverable should be such as would be fairly in the contemplation of the parties at the time the contract was made as the probable result of a breach of it; but in my opinion the parties never contemplate a breach, and the rule should rather be that the damages recoverable is such as is the natural and probable result of the breach of contract."

IMPLIED WARRANTY OF QUALITY OF CHATTEL.

The case of *Robertson* v. *The Amazon Tug Co.*, p. 598, concerns the subject of implied warranty as to condition by the owner of a chattel which another hires or contracts for the use of. Brett and Cotton, L.JJ., held that as the contract in question related to a *specified* vessel of the defendants, there was no implied undertaking by them that it should

be reasonably efficient for the purposes of the voyage which the plaintiff had contracted to take with it, and that, therefore, the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possesion of the vessel than they were at the time of the contract. "The vessel," said Brett, L.J., "was named to the plaintiff at the time of the contract, and, although I do not think it material, the plaintiff had an opportunity of seeing it. That at once makes the contract a contract with regard to that specific vessel." The distinction he draws is between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing; in the former case there is an implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used, in the latter case there is no such implied contract. "I wish to put my view as plainly as I can," he says, p. 607:—"If there had been evidence in this case that, after the contract was made, the machinery, from want of reasonable care by the defendants, had become in a worse condition than it was at the time of the contract, I should have thought that there would have been a breach of contract for which the defendants would have been liable." Cotton, L.J., draws a similar distinction between cases where the vessel is at the time of the contract ascertained and known to both parties, and cases where it is not, but he draws a further distinction between the present case, in which the plaintiff had contracted with the defendant for a sum to be paid by them to take a vessel and barges to South America, with liberty to use the vessel as a tug, and cases of hiring and letting of an ascertained chattel, saying that "there is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel." Bramwell, L.J., dissented from his colleagues, holding that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. This judgment seems an example of the habit of the learned judge referred to in the letter written by him, and printed in our number for Nov., 1st ult., where he says:—"I am prone to decide cases on principle, and when I think I have got the right one, (I hope it is not presumption) like the Caliph Omar, I think authorities wrong or heedless." "For," he says:—"The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another, which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do." And then goes on frankly to confess that he cannot find this rule plainly laid down any where, and that he is afraid the nearest authority is the dictum of Lord Abinger in *Smith* v. *Marrable*, 11 M. W. 5: "No authorities were wanted; the case is one which common sense alone enables us to decide." Summing up he concludes that "when the article is specific it must be supplied in a state as fit for the purpose for which it is supplied as care and skill can make it." A brief note as to a similiar implied warranty of quality on the sale of a chattel may not be out of place. That there is such a warranty where the vendor is the manufacturer, is well settled, (Saunders on Warranties, p. 57; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Randall* v. *Newson*, L. R. 2 Q. B. D. 102.) It would also appear to exist in cases where the vendor is not the manufacturer; in fact the point does not seem to turn on this, but on whether the vendee relied on the skill and judgment of the vendor or whether he did not: (see *dicta* in *Jones* v. *Wright*, 5 Bing. 544; *Brown* v. *Edgington*, 2 Man. & Gr. 279; *Bigge* v. *Parkinson*, 7 H. N. 955; *Jones* v. *Just*, *supra*; and in our Courts, *Bigelow* v. *Boxall*, 38 Q. B. 452; *Church* v. *Abel*, 1 S. C. 442.)

POWERS UNDER TWO ACTS OF PARLIAMENT.

Of the cases in 6 Prob. Div. pp. 125-165, we may refer to *Prehn* v. *Bailey*, p. 127, for the purpose of noting the principle advanced it it, that where a public body has powers under two Acts, it must be taken to have proceeded under that which gave it most advantages.

PRIVATE INTERNATIONAL LAW.

In the case of the Leon, p. 148, an action in *personam* was brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, and the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel, it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain. Sir Robert Philimore held, on demmurer, that this plea was bad, for that the law governing the liability of the defendants was the general maritime law as administered in England.

We must hold over our review of the Chancery Division cases in the Law Reports for December, as also the January numbers of the Law Reports, and the Law Journal reports just received.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Wilson, C. J.] [Jan. 24.

UNION FIRE INSURANCE COMPANY v. LYMAN.

Statement of defence—Contents of paragraph in Rule 128—Calls on stock—Allotment—Vesting of shares.

Though each paragraph of statement of defence should under Rule 128, as nearly as may be, contain a separate allegation, it need not contain a separate defence.

Claim: Calls upon shares for which the defendant's testator had subscribed, and upon which he had paid ten per cent. at the time of subscription. Defence: By a by-law of the plaintiff company no subscriber of stocks should be a shareholder until the same had been allotted to him by order of the board; the testator subscribed for fifty shares, or any portion thereof which might be allotted to him, but no allotment was ever made.

Held, on demurrer, bad; for the by-law did not extend to a case in which a person on subscribing paid the necessary deposit, in whom the shares would vest under 39 Vict. ch. 93, sec. 2, (O.) the plaintiff company's Act of incorporation.

A. C. Galt, for defendant.

Maclennan, Q. C., contra.

Wilson, C. J.] [Jan. 10.

RE MISENER V. TOWNSHIP OF WAINFLEET.

Municipal Act—Drainage by-law—Withdrawal of petitions—Alteration in work petitioned for.

A petition was presented under section 529 of the Municipal Act for the draining of certain lands, by construction a drain in a certain direction and deepening a stream. The petition was signed by eighteen persons, being a majority of those shewn by the assessment roll to be benefitted by the work, viz., thirty-three. A resolution of the council was passed under which surveys and estimates were made. Subsequently five of the petitioners withdrew, some by petitioning for a simple clearing of the bed of the stream, and some by informing the council that they would dig their own drains. By a subsequent petition three more desired to do the work themselves. By another petition seven interested persons desired to add their names to those who were in favour of the work. The names of six of the original petitioners remaining were not in the schedule to the by-law of those to be benefited. This left the number of petitioners at eleven. The council having procured a second estimate, showing that by diverting the direction of the drain the work could be done at less expense, passed a by-law reciting that a majority of those to be benefitted had petitioned, and providing for the construction of the work according to the altered plans. No debentures had been issued, nor contracts let, when a motion was made to quash the by-law.

Held, that the by-law should be quashed : for (1) The council had no power to authorize the undertaking of any work other than that petitioned for, but if that was impracticable or too costly they should have refused the petition ; (2) The petitioners had the right to withdraw at any time after subscribing the petition and before the contracts were let or the debentures negotiated, *i.e.*, while the council had control of the matters--the preliminary surveys and estimates being as much for the information of the petitioners as of the council ; (3) A sufficient number of petitioners, having withdrawn to reduce the number below the majority of those to be benefited, the by-law untruly recited that a majority, &c., had petitioned.

Clement, for motion.

Bethune, Q. C., and *Rykert*, contra.

COMMON PLEAS DIVISION.

Wilson, C. J.] [Jan. 21.

BERRY V. ZEISS, ET AL.

Married woman—Separate business— Personal liability.

Held, that debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate.

Bethune, Q.C., for the plaintiff.

No one appeared for the defendant.

CHANCERY DIVISION.

Proudfoot, J.] [Nov. 9.

FARRELL V. CAMERON.

Trustee and cestui que trust—Marriage settlement.

The plaintiff, in 1854, being about to marry, conveyed certain lands to trustees—one of whom was her intended husband—upon trust to suffer her to receive the rents, etc., to her own use during her natural life, and upon her death, if she should have a child or children surviving her, in trust to convey the lands, etc., unto such child or children, their heirs, etc., for ever, freed and discharged of the trusts mentioned in the deed ; and in case of her death before her husband without any child, in trust to permit him to receive the rents, etc., for life, and after his death, or in case he should die before the plaintiff, she leaving no child, then in trust to convey the said lands to her right heirs, freed and discharged from the trusts thereof. The deed gave the trustees power to sell or lease, and also to borrow on the security of the lands.

The husband died in 1879, there never having been any children of the marriage, and the plaintiff, who was then 53 years old, requested the trustees to reconvey the trust estate to her, which they declined to do without the sanction of the Court, as the trust for children was not confined to the issue of the then contemplated marriage, but was wide enough to include the children of any other marriage : but

Held, that as there were no children, and it must be assumed that the plaintiff never could have any children, she was entitled, as equitable tenant in fee simple, to call upon the trustees for a conveyance ; the costs of the trustees to come out of the estate.

McMichael, Q.C., for plaintiff.

McCarthy, Q.C., for defendant.

Boyd, C.] [Jan. 11.

TRUDE V. PHŒNIX INSURANCE COMPANY.

Practice—Trial by Judge—Rehearing — Divisional Court, jurisdiction of—Judicature Act.

A cause having been heard and a decree pronounced therein on the 19th of May, 1881, and subsequently set down for re-hearing before the Divisional Court, after the coming into force of the Judicature Act :

Held, that Rules 274 and 317 restrict the jurisdiction of the Divisional Court after judgment to cases in which the findings of fact have been undisputed, and it is only sought to modify or set aside the conclusion drawn by the judges therefrom ; but if the appeal is on the whole case, as to both facts and law, it must be to the Court of Appeal.

Plumb for plaintiff.

Foster for defendant.

Boyd, C.] [Jan. 16.

IN RE SOLICITORS.

Solicitor and Client—Costs, right to receive—Onus of proof.

C., who was in active practice as a lawyer, had obtained a mortgage on a valuable leasehold estate, and having taken such proceedings as resulted in a forfeiture of the mortgagor's term, procured from the owner of the property a renewal of the lease to himself. The mortgagor instituted proceedings to redeem, but C., feeling that he was absolute owner of the interest, instructed the solicitors to defend the suit. They expressed to C. some doubt as to his right to resist the claim of the mortgagor, whereupon he, with one of the solicitors, went to an eminent real estate counsel, who, being pressed for time, advised them that the suit should be defended. C. drafted his answer, his solicitor adding one clause. Counsel at the hearing told C. he would undoubledly fail in the litigation, and the usual decree for redemption was pronounced, C. being ordered to pay such costs as had been occasioned by his resisting redemption. It was alleged against the solicitors that they had advised C. that he would be entitled to costs in any event; that they had refused to consider or submit to him an offer to pay the mortgage money and costs, on the ground as they alleged that C. claimed about three times the sum offered; that they had colluded with the mortgagor's solicitor in having proceedings instituted which they had wrongly advised him to defend; and that he had had a good defence but the same had been negligently managed. There was a written retainer which did not express any special arrangement as to costs or the terms on which the defence was to be conducted. The Court being of opinion that C. had failed to make good his charges against the solicitors, affirmed the order made by Spragge, C., reversing the finding of the Taxing Officer that the solicitors were not entitled to recover the costs of the litigation.

S. H. Blake, Q.C., for solicitors.

Boyd, C.] [Jan. 18.

RUMOHR V. MARX.

Pleading—Practice—Amended statement of claim—Partial demurrer.

The defendant having filed his statement of defence, the plaintiff replied thereto by amending his claim, by adding to the statement two new paragraphs which would have been demurrable if pleaded as a reply. The matters thereby set up, when separated from the rest of the statement, did not disclose any distinct cause of action. Thereupon the defendant served an amended statement of defence and demurred to the two paragraphs which had been so added. In view of the fact that the paragraphs which had been so added did not disclose any separate or substantial cause of action, and that the demurrer, however decided, could not advance the cause, the Court (Boyd, C.) over-ruled the demurrer without costs, as it was the first occasion the point had arisen under the Judicature Act.

The propriety of partial demurrers which do not bring up the whole or even a substantial question between the litigants, thus tending to increase costs, considered and remarked upon.

Moss, Q.C., for plaintiff.

Wm. Douglas, for defendant.

CHAMBERS.

Boyd, C.] [Jan. 17.

LOWSON V. CANADA FARMERS INS. CO.

Leave to appeal from Master's order—Rules 414, 427, 462.

Where an appeal from an order of the Master in Chambers should have been set down on the 29th of December, but owing to an announcement by the Registrar that cases set down for that time would not be heard until the 9th of January following, the case was not set down till the 9th of January.

Held, that rule 414 O. J. A. did not apply and that leave under Rules 427 & 462 O. J. A. must be obtained from the Master in Chambers before the appeal could be heard.

Cattanach, for the appeal.

H. Cassells, contra.

Boyd, C.] [Jan. 16.

RE DOWLER.

Husband and wife—Administration.

A widow married a second time and then administered to her first husband's estate. She lent moneys received by her as administratrix to her second husband, who died leaving her sur-

viving. The administration and loan were both after 1872.

Held that her right to recover against her second husband's estate was not affected by the Statute of Limitations.

Mr. Dalton, Q.C.] [Jan. 17.

FREED v. ORR.

Making certificate of judgment an order of High Court.

This was a motion to make the certificate of judgment of the Court of Appeal an order of the High Court of Justice.

H. Cassels for the motion.

MR. DALTON.—I have seen Mr. Holmested who agrees with me that any order in Chambers is unnecessary. All that he could do with my order he can do with the certificate from the Court of Appeal. I should say that Mr. Holmested has a doubt whether the process should not now issue from the Court of Appeal; this is founded on section 14 of the Judicature Act. I do not partake in that doubt. I think that the section 14 merely confers an additional power on the Court of Appeal without interfering with the practice under the Appeal Act.

Boyd, C.] [Jan. 16.

RE BLEECKER & HENDERSON.

Costs—Taxation—Appeal.

A solicitor's bill had been taxed by the local Master at Belleville, at the instance of the client, who now moved to have it referred to the Taxing Officer at Toronto for revision.

Held, that there was no right of revision under Rule 439 which applies only to taxations between party and party; that the practice in appealing from certificates of taxation between solicitor and client is unaffected by the O. J. A., and that the appeal should have been made under R. S. O. cap. 140, sec. 49.

Mr. Dalton, Q. C.] [Jan. 17.

BARRETT v. BARRETT.

Settlement by parties to deprive Solicitor of costs.

Plaintiff and defendant met and agreed upon a settlement of the suit without providing for payment of plaintiff's costs. The defendant's solicitor refused to act in the matter when he saw the agreement. The parties then went to another solicitor who told them that in any settlement provision ought to be made for the payment of costs. No settlement was arrived at then. Subsequently the parties went to another place and employed a solicitor to draw an agreement between them. The plaintiff's solicitor refused to recognize the agreement and attempted to force on the trial. The parties again met at another place and the plaintiff employed a solicitor to draw written papers in which no provision was made for costs. The plaintiff was insolvent to the knowledge of the defendant.

Held, on the evidence adduced, that there was a combination between the defendant and plaintiff to defeat the claim of the latter's solicitor for costs, and an order was made for the payment thereof by the defendant as between solicitor and client.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, Esq.)

SCHNEIDER v. BATT.

Imp. O. 16, rr. 18, 21—Ont. O. 12, rr. 20, 23. (Nos. 108, 111.)—Third party—Notice.

B. ordered goods of a certain quality from P. and directed him to deliver them to S., who had ordered goods of the same quality from B. When the goods were delivered, S. complained of them to B. as being of inferior quality. B. subsequently wrote to P. that the goods had been examined by his agent, that they were of inferior quality, and that he should not accept them. S. having commenced an action against B. for the return of the purchase money, B. obtained leave to serve P. with a third party notice, under Imp. O. 16, r. 18, (Ont. No. 108); P. entered an appearance, and pleadings were delivered to and by him. Upon an application to a Master by B. under Imp. O. 16, r. 21 (Ont. O. No. 111) for directions as to the mode of trial; *Held*: that the letter written by B. to P. being evidence against him, but not against P., it would be unjust that the liability of B. and P. should be determined at one trial, and that no direction should be given.

[May 19, C. of A.—45 L. T. N. S. 370.

The above head-note sufficiently shows the facts. The Master refused to give any direc-

tions; and on appeal his decision was affirmed by Denman J., whose decision was affirmed by the Q. B. D.

From this decision the defendants now appealed.

F. O. Crump, for defendants, suggested that the Court might direct that the question between the plaintiff and the defendants and that between the defendants and P. should be tried by different juries. He cited *Benecke* v. *Frost*, L. R. 1 Q. B. D. 419; *Swansea Shipping Co.* v. *Duncan*, L. R. 1 Q. B. D. 644.

THE LORD CHANCELLOR:—The last suggestion of Mr. Crump seems to me really to dispose of this case. He suggests that the true way of doing justice in this matter would be that the Court should direct two trials by two distinct juries. That would be altogether contrary, in my opinion, to the intentions of these rules. The real truth is that these two contracts are not so connected with one another as to make it appear that a question in the action should be determined as between the plaintiff, the defendant and another person. I do not say that under the rules a third person might not be brought in even though the two contracts were not more connected than they are in the present case. But, assuming that the rules do empower the Court to order, in a case like the present, that a third person shall be a party to the action, that is only to be allowed where it appears that justice will best be done by having a common question tried at one time between all the parties. In the present case a letter has been written by the defendants, which would be evidence against them, but not against the third party P. He would be prejudiced by the admission that the defendants have made, if his case was tried with theirs. The plaintiff, S., would also be prejudiced, as he could not then rely on the admission alone. Justice will not, therefore, best be done in this case by having but one trial. I may add that a very strong case would be required for us to overrule the judgment of three tribunals in a matter of discretion.

BAGGALLAY, L. J., concurred.

BRETT, L. J., in his judgment said:—P. ought to have resisted the order making him a third party, but he appeared. We cannot, however, do injustice because the parties have blundered. The question is, are we to make any order by which P. will take a part at the trial of this action. It seems to me that to answer that involves no decision on any rule or on any order; it is a question as to how to do justice in the particular case. I am of opinion that we ought not in this case to order one trial.

[NOTE.—*Imp. O. 16, r. 18 and Ont. O. No. 108 are identical except that the latter does not require the leave of the Court or Judge before service of a third party notice, nor does it require the notice to be "stamped with the seal with which writs of summons are sealed." Imp. O. 16, r. 21 and Ont. O. No. 111 are identical except that the latter empowers a Court or Judge to determine as to the costs of the proceedings. A subsequent application in this matter, arising out of the one here noted, is noted in 17 C. L. J. 369.*

HARTMONT v. FOSTER.

Imp. Jud. A. 1873. s. 49. O. 1. r. 2.—Ont. Jud. A. s. 32. O. 1. r. 2.

No appeal lies from a judge's order dealing with the costs of an interpleader issue, made as between the parties.

[Nov. 24, C. of A.—45 L. T. N. S. 429.

A verdict having been directed for the claimant on the trial of an interpleader issue, the execution creditor took out a summons that the claimant might be directed to pay costs.

The summons came before Caves, J., who referred it to Hawkins, J., before whom the parties attended when he was sitting at Westminster.

Hawkins, J., then made an order directing the claimant to pay the costs of the execution creditor and of the sheriff.

Denman and Williams, JJ., having held that no appeal would lie from this order, the claimant now appealed to this court.

BRETT, L. J., after deciding that Hawkins, J. was sitting in a legal sense, not in Court but in Chambers, and therefore had jurisdiction to make the order proceeded to deal with the contention that O. 1, r. 2 gives an appeal in interpleader. He said:—

"To make out this proposition, the party desiring to appeal must show not only that O. 1. r. 2 applies (which it certainly does), but further that the practice before the Jud. Act was to entertain appeals from orders made as to costs in interpleader proceedings as between the par-

ties." He then observed that it did not appear that there was any case reported in which any Court ever did entertain an appeal from a judge's order as to the costs of interpleader proceedings as between the parties, while *Teggin* v. *Langford*, 10 M. & W. 556, does not bear out the argument put forward in support of the appeal in the present case, and if it had done so would be open to review, and moreover, "when a question of this kind is raised, one case does not make a practice." He concluded thus:-

O. 1., r. 2. does not give any power to entertain appeals, but even if it did I should try to construe it so as not to contradict the express provisions of the Imp. Jud. Act, 1873, s. 49 (Ont. Jud. Act, s. 32.) I think the rule is not inconsistent with this section; and the section contains an express enactment that appeals shall not lie as to costs, and this applies to interpleader as well as to other proceedings. It would be strange if this were otherwise, it would be an anomaly that there should be no appeal as to the costs of an action, which often comes to a very large amount, and there should be an appeal only where the costs are of minor consideration, as is the case in interpleader. I do not think the case of *Hamlyn* v. *Batteley*, L. R. 6 Q. B. D. 63, interferes with this decision. That case was as to the carrying out of an interpleader order, and there was not an express enactment relating to the question as there is here.

COTTON, L. J., concurred, and added that *Dodds* v. *Shepherd*, L. R. 1 Ex. D. 75, does not decide the point.

LINDLEY, L.J., also concurred, and added that if the section of the Act and the order were inconsistent he should say the rule must give way to the statute.

[NOTE.—*Imp. Jud. Act, 1873, s. 49, and Ont. Jud. Act, s. 32, are identical: as also (mut. mut.) are the Imp. and Ont. orders.*]

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

REGISTRAR'S OFFICE.

REID V. WILSON.

Mortgage—Interest.

Where no interest is reserved by a mortgage, n is recoverable until after day appointed for payment

Effect of proviso in mortgage for payment amount secured "without interest if paid when due."

[Nov. 15, 1882.—Mr. Holmested

The plaintiff had issued a writ on a mortgage, and had endorsed the writ for $400, and interest from 16th Sept., 1871.

The defendant paid into Court $400 and interest from 16th Sept., 1881, to the date of payment, and had filed a note disputing that any more was due.

Notice of taking the account before the Registrar of the Chancery Division having been served,

T. Langton appeared for the plaintiff.

G. M. Rae, for the defendant.

Coote on Mortgages, 4th ed., p. 867; *Farquhar* v. *Morris*, 7 T. R. 144; *Carey* v. *Doyne*, 5 Ir. Chy. R. 104, were referred to.

The facts are sufficiently stated in the judgment of

THE REGISTRAR:—This action is on a mortgage. The proviso is for payment of several instalments to different parties, one of which is in default, and for non-payment whereof the action is brought. The defendant has paid into Court the amount of this instalment and the interest which has accrued thereon since it fell due, and disputes the right of the plaintiff to interest prior to the instalment falling due. The mortgage is dated 16th September, 1871. The proviso is as follows: "Provided this mortgage to be void on payment of $2,400 of lawful money of Canada, as follows, that is to say; 1st, to pay unto the said Ellen Gilmor $400 in ten years after the date hereof." It then enumerates five other payments, and winds up: "all without interest, if paid when due to the above parties." There is the usual covenant to pay "the mortgage money and interest and observe the above proviso."

It is contended by the plaintiff that there having been default in payment, interest runs from the date of the mortgage notwithstanding the words, "all without interest, if paid when due to the above parties." It was urged that if nothing had been said about interest in the mortgage the several instalments would have borne interest from the date of mortgage, and that the stipulation "all without interest, if paid when due to the above parties," only exonerates the mortgagor from his *prima facie* liability to pay interest, provided he pays at the days appointed. Two cases are referred to in support of this proposition: *Farquhar* v. *Morris*, 7 T. R. 144, and *Carey* v. *Doyne*, 5 Ir. Chy. R. 104.

As it appears to me, neither of the cases do in fact establish that where the proviso is for payment of a sum certain at a future day without any mention of interest, that the law annexes to that proviso an obligation to pay interest also from the date of the instrument. Interest was allowed in both the cases referred to, because the debt for which the security was given was *presently payable*, and the security in no way postponed the payment. They are authorities for saying that after the debt secured becomes payable according to the instrument, interest may be recovered from that date.

No other case that I have been able to find supports the plaintiff's contention. In *Thompson* v. *Drew*, 20 Bev. 49, where the mortgagee agreed to reconvey on payment of principal, no interest was allowed, and I think that governs this case. Since the case of *Cook* v. *Fowler*, 7 E. & I. App. 27, it must be held to be settled that interest can only be recovered after the time fixed by a contract for payment of money with interest (in the absence of an express agreement to the contrary) by way of *damages*, and not upon any inplied contract to continue paying the stipulated rate of interest, or any interest at all, after the day appointed by the contract for payment. If there is no implied contract to pay interest *after* the day fixed for payment, I do not see how there can be any implied contract to pay interest *before* the time appointed for payment when the contract of the parties is silent on the point.

It appears to me where the parties to a mortgage stipulate for the payment of a sum certain at a future time, and no mention is made of interest, no interest can be recovered until after that time has elapsed, (see *McDonell* v. *West*, 14 Gr. 492).

The question remains whether the words, "without interest if paid when due" can alter the case. I do not think they can. What penalty, if any, the parties intended should be imposed if the money were not paid "when due" does not appear from the mortgage. The plaintiff says the intention of the mortgage is to oblige the mortgagor to pay interest on the amount in default from the date of the mortgage, (a period of ten years), but I think I might as reasonably hold that he is to pay $1,000 penalty for his default as that he is liable to pay the ten years' interest claimed. I therefore disallow the plaintiff's claim to the extra interest claimed by him.

CHAMBERS.

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BURRITT V. MURDOCH.

Motion for judgment in default of appearance,—Service of notice of motion—Rules 406, 131.

[Dec. 21, 1881.—Jan. 16, 1881.—Proudfoot, J.

Walter Read, for plaintiff, moved for judgment in default of appearance. The action was against a trustee for an account. The defendant did not appear and judgment was awarded in accordance with the prayer of the statement of claim On coming to draw up the judgment, it appeared that the notice of the motion for judgment had not been posted up or served on the defendant, and the question was submitted to the learned judge whether, under the circumstances, the judgment should be entered. *Gillot* v. *Ker*, W. N. (1876) 116; *Dymond* v. *Croft*, 3 Ch. D. 512; *Parsons* v. *Harris*, 6 Ch. D. 694; *Rules* 406 and 131 were referred to.

PROUDFOOT, J.—After consultation with the other members of the Chancery Division, held that the practice as laid down in *Dymond* v. *Croft*, and *Parsons* v. *Harris* must be followed, and that although the defendant had not appeared to the writ of summons, notice of motion for judgment must be served. Such service might be effected by posting up a copy in the office under Rule 131, and as notice had not been served in the present case the judgment ought not to be entered.

COUNTY COURT.—COUNTY OF ONTARIO.

(Reported for the LAW JOURNAL.)

OSHAWA CABINET CO. v. NOTE.

Practice—Devolution of cause of action—Continuance of suit.—Rules 164 & 385, O. J. A.

Where a cause of action has devolved upon a third party, the proper course is to take out an order upon *præcipe* to continue the action, under Rule 385, and not to proceed as directed in Rule 164.

[November 12, 1881.—Dartnell, J. J.

Action on a promissory note, to which the defendant appeared and filed pleas, which were afterwards struck out. The defendant asked leave to plead, that the note in question had been transferred to the plaintiffs to secure a debt of the payee, one T. N., to them, which note, since the commencement of the action, had been satisfied by T. N., and, that he thereupon became the beneficial plaintiff. The plaintiff admitted these as facts, and the defendant swore he had a good defence upon the merits, as against T. N. The question then arose as to the proper practice to pursue.

DARTNELL, J. J.—I think there has been such a devolution of the cause of action as to entitle T. N. to an order to continue the action in his own name, under Rule 385. Under the old practice the plaintiff could admit the truth of a plea, *puis darrein continuance*, and discontinue his action. He would be entitled to his costs up to that time. This in effect continues to be the practice under Rule 157.

It is contended that Rule 164 applies to this case. I do not think it does. I think the new plaintiff should take out an order, under Rule 385, and that the former plaintiffs should have their costs. Judgment having been entered, this will be set aside upon payment of these costs; T. N., the new plaintiff to file a new statement of claim, to which the defendant may plead as he may be advised.

DIGEST OF RECENT DECISIONS IN UNITED STATES COURTS.

DURESS.

A threat of suicide by the husband to induce his wife to sign a note will not amount to duress. *Remington* v. *Wright.*—Central L. J., Jan. 13.

MECHANICS' LIEN.

A foreman engaged in directing the work in a mine performs "work and labour" in the mine within the meaning of the Mechanics' Lien Law, and is entitled under it to a lien upon the mine for services. *Flagstaff & Co.* v. *Cullins.*—Ib.

NEGLIGENCE— MASTER AND SERVANT.

The introduction by the employer of new and unusual appliances involving unanticipated danger to the employee, without giving notice to such employee of the character of the new appliances, is negligence. *O'Neil* v. *St. Louis, etc., R. Co.*—Ib.

NEGLIGENCE--RAILWAY FIRES.

In an action for damages for injuries to property by fires caused by sparks from the defendant's locomotive engine, evidence having been admitted on behalf of the defendant, that the spark arrester was examined at the end of the return trip and was found to be in good condition. It was *held*, that evidence that property had been set on fire in the same neighbourhood upon this return trip was admissable. *Loring* v. *Worster, etc., R. Co.*—Ib.

BILLS AND NOTES—ALTERATION.

When one of the signers of a promissory note adds to his signature the word "surety" and the others do not, the presumption is that the note was given for value by the other makers, and that they are the principal debtors, and the erasure of the word "surety" was a material alteration of the instrument and avoided the note. *Rogers* v. *Tapp.*—Ib.

BILLS AND NOTES—ENDORSEMENT IN BLANK.

1. An indorsement in blank of a negotiable promissory note is a complete commercial contract, and not in any sense an unpaid contract. Consequently evidence of a prior agreement between the parties at the time, that it should merely have the effect of an indorsement "without recourse," is admissible.

2. When the maker of a note is insolvent, a failure on the part of an indorsee to prosecute it to judgment against him will not prejudice his claim against the indorser. *Martin* v. *Call.*—Ib. Jan. 20.

MASTER AND SERVANT.

The relation of master and servant is such that the servant will be restrained by injunction from making use of the knowledge and information of his master's affairs acquired in his service, to engage in a business enterprise (during the continuance of the contract of service) which will have a tendency to place him in a position of antagonism to the interests of his employer. *Gower* v. *Andrew.*—Ib.

AGENT—ACTING FOR BOTH PARTIES.

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, *prima facie*, inconsistent duties, and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other, which

would naturally affect his action, and assented to the double employment. But when such knowledge and consent are shown he may recover from each party. *Bell* v. *McConnell.*—Ib.

(See also *Kersteman* v. *King*, *ante infra*, vol. 15, p. 140.

BILLS AND NOTES — AGREEMENT AS TO LIABILITY.

An accommodation indorser cannot set up, in a suit against him by his indorsee, that there was an agreement between them at the time of putting their names on the paper that such indorsement should constitute a joint, and not a successive, liability. *Johnson* v. *Ramsay.*—Albany L. J., Jan. 14.

MUNICIPAL LAW—DEFECTIVE STREETS.

The council of a city had exclusive power over the streets, highways, bridges, etc., in the city, and to make repairs thereof. The council held stated meetings once in two weeks, and special meetings were authorized at any time upon the call of the mayor or five councilmen. *Held*, that notice to a councilman of a defect in a bridge in the city was notice to the city rendering it, in case of a neglect to repair, liable to one injured by the defect. *Logansport* v. *Justice.*—Ib.

PUBLIC OFFICER—BOND—SURETIES.

An action cannot be maintained against a constable and his sureties on his official bond, for a trespass committed by him in taking the goods of a stranger on an execution issued against the property of another person. The remedy in such case is by an action of trespass or trover against the officer personally, and against the plaintiff in the execution if he be a party to the trespass.

For any breach of official duty by a constable, his official bond is responsible; this is the extent of liability assumed by the sureties. If he commit a wrong, not in the discharge of his official duty, he is personally liable, but his sureties cannot be held responsible therefor; it is not within the terms of their contract. *State of Maryland* v. *Brown.*—Ib.

CONTEMPT—JUSTICE OF THE PEACE.

A justice of the peace sitting in the court for the trial of small causes, engaged in the trial of a civil cause, has no power to commit to prison as a punishment for a contempt committed in open court. *Rhinehart* v. *Lance.*—Ib.

WOMEN MAY BE ARBITRATORS.

Under a statute making no provision that men only shall be appointed arbitrators, *held* that a married woman could be appointed third arbitrator by the other two arbitrators and that the fact that the appointment was made in the absence of one of the parties would not invalidate the award as to that party. *Evans* v. *Ives.*—Ib.

LIBEL—INDICTMENT.

A publication is libelous if, without charging an indictable offence, it falsely and maliciously imputes conduct tending to injure reputation, to cause social degredation, or to excite public distrust, contempt or hatred. An indictment is good if it charges the publication as matter not libelous *per se*, but charges such publication with proper inducement and inuendoes to set forth and explain the deformatory statements of the publication. *State* v. *Spear.*—Crim. Law Mag., Jan. 1.

MURDER.

The word "deliberately," as used in the statute defining murder in the first degree, means in a cool state of the blood as contra distinguished from a heat of passion. But the term "passion" in this connection is not limited to that heated state which comes from and is produced only by some legal provocation. *State* v. *Lewis.*—Ib.

CORRESPONDENCE.

Bylaws—Imprisonment with hard labour.

To the Editor of the LAW JOURNAL.

SIR,—A by-law of the Town of Woodstock was passed in 1866, which provided that any person convicted of an offence under it, might in default of payment of fine, be imprisioned in the common jail with hard labour.

Under the Municipal Law then in force, 29 30 Vict., chap. 51, section 246, sub-section 8, this by-law was legal, and within the power of the municipality to pass, and has never been repealed or changed.

In 1881, a person was convicted under it, and the conviction, was appealed on the ground (amongst others) that the by-law was now bad for imposing imprisonment with hard labour, (see *Regina* v. *Nancy*, 46 U. C. R., 153), but the point was not decided by the learned chairman, as the conviction was bad upon other grounds.

Now, are by-laws, valid at the time of passing, imposing hard labour, still valid; and can this punishment be inflicted under them; and if so, could the Ontario Government require such by-laws to be rescinded? If these by-laws are valid, the result is, that one municipality may inflict the punishment of imprisonment with hard labour, while a municipality created since the passing of the British North America Act, in the same county, cannot inflict the same punishment, for the same offence. This point is mentioned in the argument of Mr. Hodgins, in the case quoted obove.

WOODSTOCK

CORRESPONDENCE.

Practice in County Courts.

To the Editor of the LAW JOURNAL.

SIR,—There appears to be a difference of opinion agongst the County Court Judges as to the proper practice to be observed in making Chamber applications in the County Courts, some judges holding that such application should be made on notice and others being of opinion that they should be on summons.

Rule 490 applies the practice for the time being of the High Court to the County Courts.

Rule 412 provides that every application at Chambers in Toronto shall be made in a summary way on notice, instead of by summons, while Rule 425 provides that every application to a County Court Judge or Local Master shall, where notice of the application is necessary, be made in a summary way by summons.

On the one hand it is contended that the ordinary practice is laid down in Rule 412; and that it is the ordinary practice that is to be followed and not the exception. On the other hand, it is argued that the reason for making the distinction between the methods of bringing on an application before a County Court Judge, and an application in Chambers in Toronto, is that the County Judge, from the nature of his duties, cannot possibly be in Chambers every day, and that if a notice of motion were given for a particular day there might be no judge present in Chambers to hear it, while Chambers being held regularly in Toronto, no such difficuly would be likely to arise there. And that this reason applies with equal force to applications in County Court matters as to applications in such High Court matters as are competent for County Court Judges, after the 1st of January last, to dispose of. As this is a matter of public interest to the whole profession, I would be glad if you would favour us with your opinion upon it.

Yours, etc. J. R.

[Rule 425 seems clearly to show that in all cases of application to a County Court Judge or Local Master *under the Act or Rules*, must, where notice is necessary, be by summons.

In the case of applications, *other than those under the Jud. Act and Rules*, Rule 490 seems to show the question to be, whether the former practice of the County Court corresponded with the High Court *in this* respect, and if so, then notice should be by summons, for Rule 425 shows such is the proper course in cases of applications at Chambers, authorized by the Jud. Act or Rules, out of Toronto.

If the practice of the County Court in these latter cases differed from that of the practice of the Superior Courts, the Jud. Act does not appear to make any express provision, and therefore it will presumably continue as before.

—EDS. L. J.]

Surrogate business and the uncertificated. —Commissioners.

To the Editor of the LAW JOURNAL.

SIR,—I do not wish to add anything to the apparently fruitless discussion anent the unlicensed conveyancing evil, as the subject has already been thoroughly ventilated in your columns, but I would call the attention of your Journal to a grievience which is the outcome of that evil, and the remedy for which fortunately does not require any exertion on the part of indifferent benchers, or any intervention by a too politic legislature. I allude to the steady increasing practice of these unlicensed ones in the Surrogate Courts of the Province. Nothing is more common in the country sections than to see probate papers and letters of administration endorsed with the name of some one of these gentry, as the person who procured their issue, with probably an advertisement superadded of the Insurance Company he represents, or the Loan Company for which he is an agent. Now unless my rendering of the Surrogate Court Act is incorrect, the proceedings therein can only be undertaker by a solicitor or attorney, or by the applicant in person, and the practice of which I complain is not only unauthorized, but is in open defiance of the Act. And yet our Surrogate Court clerks, who are, or ought to be, familiar with the provisions of the statute under which they act, recive and file these papers, and our Surrogate Court Judges in adjudicating under the Act, pronounce them sufficient, stamped though they be with an avowal that one section of the Act, which is certainly entitled to some notice, has been utterly set at naught. Thus another fruitful source of income is taken away from the country practitioner, and that with official and judicial sanction. We may become enured to the idea, that the payment of our annual fees is a self-compensating privilege, or that our certificates confer an imaginary protection, and cease to disturb the masterly inactivity of our repre-

sentatives at Toronto, or to embarras a Government by asking for legislation odious to many of its supporters; but it is little to ask that a section of a statute, designed for our protection, should not be totally disregarded by those appointed to administer its provisions, and that the officials who exercise a supervision over the Surrogate Court offices should advise the clerks of those offices that a breach of any of the provisions of the statute regulating the procedure of of the Court should be fatal to the reception of papers on the face of which that breach is manifest. Otherwise we have no security as to where the invasion may stop, for it appears that it is only an *attorney* who practices without a certificate that is liable to a penalty.

While writing I would draw your attention to another point which, though not actually a grievance, is still a serious inconvenience, viz.: the fact of an attorney's commission to administer oaths being confined to the limits of one county or union of counties, while appreciating the reasons for such a limit being placed in the case of non-professional man, it is difficult to understand the motive in the case of one who is entitled by virtue of his certificate to practice anywhere within the jurisdiction of the Court which grants the commission, and who is entitled to that commission upon the mere production of the certificate. To those who find it necessary in consequence of the competition with Magistrates, Division Court clerks, etc., to open offices in two or more counties, and to those who for the same reason are forced to change their field of practice, the restriction is more than an inconvenience, and I would like to be informed what was the reason for its adoption, and what is the necessity for its retention.

Hoping that the above remarks may find a place in your columns, I remain,

A DULY CERTIFIED ATTORNEY.

[We have already called the attention of the County Judges to the matter firstly referred to by our correspondent. It is surprising that this well founded grievance should be allowed to continue. We understand the County Judges meet occasionally to discuss matters affecting their duties, rights and privileges. This surely would be an appropriate object for discussion, and it cannot be said that some of them at least have not heard of it before.—EDS. L. J.]

Removal of County Judges—Powers of Local Legislatures.

To the Editor of the LAW JOURNAL.

SIR,—An able contributor in your 1st Dec. No., on the subject of the removal of County Judges, rightly claims that the power to remove must be held to reside with the same executive authority that has the right to appoint; and it seems to be a corollary to this proposition that no Parliament but the one of which this executive forms a part, can direct the mode of the exercise of this power. But it is not accepted as law in this Province that neither the appointment or removal of a Judge is any part of the constitution, maintainance or organization of a Court, as the writer at page 447 suggests. On a kindred topic, the appointment of Justices of the Peace, the local statutes, giving authority to the Lieutenant Governors, are open to much discussion; but it is submitted that they are practically, and ought to have been entitled, "Acts to provide for the maintainance and organization of the offices and Courts of Justices of the Peace." If these acts are all *ultra vires*, then all the every day local legislation making such functionaries as aldermen, &c., *ex officio* Justices of the Peace is equally as bad. A local statute having assumed to authorize the Municipal Councils to select from among the Justices of the Peace stipendiary Magistrates for distinct "police divisions," the question of the validity of such legislation was decided at Digby in the case of the *Queen* vs. *Bakin* by Savery, County Judge, a copy of whose judgment I subjoin.

Nova Scotia, LEX.
December, 1881.

The following is the judgment of Judge Savery above referred to:—

"The question is substantially the same as that discussed in *Ganong* v. *Bailey*, 1 P. & B. (New Brunswick) p. 324, and the lucid reasoning and clear exposition of legal principles in the dissenting judgment of the Chief Justice in that case demand great respect as well as careful consideration. It is undoubtedly true that a legislature of which the Sovereign is not a part cannot ordinarily legislate on a matter affecting a prerogative of the Crown, as the appointment of Judges and Justices of the Peace undoubtedly is; but it is claimed that the Parliament of the Empire has by the British North America Act delegated to the local legislature the power to do so to the extent involved in this statute. No Act of Parliament can be held to take away or

CORRESPONDENCE.

diminish or authorize the taking away or diminishing of a royal prerogative unless the intention to do so appears by "express words or necessary implication," or by terms that make the "inference irresistible." But the strictness of construction required must depend largely on the nature and importance of the prerogative affected, and as to the appointment of Magistrates of this class, I think it sufficient that on reading the statute, and comparing the sections *in pari materia* together in the light of the manifest scope and policy of the whole, the intention should be clear to the judicial mind, as a reasonable and common sense deduction. Subsection 14 of sect. 92 of the B. N. A. Act assigns to the Provincial Legislatures not only the constitution but the 'organization" of Courts ; and section 96 prescribes what judges are to be appointed by the Governor General. "Organization" is defined by Webster as "the act of distributing into suitable divisions and *appointing* the proper officers, as of an army or a government." The language of sub-section 14, if this definition be correct is therefore fully as strong as that of sub.-sec. 4, by which the local legislature is enabled to legislate in relation to the "appointment" of Provincial officers, which it must not be forgotten is equally a branch of the royal prerogative. See Blackstone's Com. p. 272. But sec. 96 limits and curtails what would otherwise be the "sweeping" effect of sub.-sec. 14, by defining what judges shall, nevertheless, be appointed by the Governor General, naming only those of certain Courts of peculiar dignity and jurisdiction; and as a qualifying clause controlling the general terms of sub.-sec. 14 of sec. 92 it would be a gratuitous violation of a sound principle of construction not to apply to it the maxim "*expressio unius est exclusio alterius.*" This is said in Broom's Legal Maxims to be a "general principle of law," which applies "where in an instrument there are general words first, and an express exception afterwards," p. 507. "A statute, it has been said, is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to a statute that *expressio unius est exclusio alterius.* "The sages of the law, according to Plowden, have ever been guided in the construction of statutes by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and sound discretion:" Broom, p. 515. Here then we have the Provincial Legislature in express terms authorized generally to make laws in relation to the "organization of the Courts," language which includes one of the prerogatives of the Crown, viz.: the appointing of judges, as the greater includes the less; and further on we have what operates as an exception or prohibition to this power of legislation so far as it affects the appointing of a certain class of judges specially mentioned and not including those under consideration. If the term "organization" does not include the appointment of the judges, it is difficult to see what "sense" or "meaning" it can have after the word "constitution"; and that the framers of the Act must at all events have so understood it, is evident from their having found section 96 necessary; and if section 96 were intented to embrace such Courts as these, its language would have been "all the judges," instead of "the Superior District and County Judges"; for one cannot imagine a Court that is not territorially or in some sense a "District Court." I think therefore that the local legislatures may establish a local and inferior Court, and provide for the appointment of its judges otherwise than by the Crown ; a privilege which if sought to be abused, or exercised to an anomalous degree or in a manner inconsistent with British principles, can be checked by the veto power residing in the Dominion Executive. I think that while the judges mentioned in sec. 96 must be appointed by the Queen's representative, all others may be appointed as the proper legislative authority prescribes ; and in the absence of legislation on the point then by the Queen's representative, as I decided in the case of Justices of the Peace."

FLOTSAM AND JETSAM.

Sir Richard Malins, formerly Vice-Chancellor of England, died on the 15th ult. He was born in 1805 and called to the Bar in 1830.

We learn from the Halifax papers, that a meeting of the Barrister's Society was held recently, at which the salary of the Equity Judge was considered. It was orininally $5,000, but an Act was passed several years ago that upon the death or resignation of the present incumbent it should be reduced to $4,000. A resolution was unanimously adopted by the meeting asking the Dominion Government to allow the salary to remain the same as at present. It was also resolved to request the Government to make a considerable increase in the salary of Judge Johnston, of the Halifax County Court, in consideration of the large amount of labor devolving upon him.

"Without prejudice," is a phrase often used, and has a good legal ring about it. We all remember Mr. Guppy, the lawyer's clerk in Bleak House, who expressed his admiration for Miss Summerson, and was careful to ask that his suit was to be "without prejudice." A decision of Mr. Justice Fry, *Law Times*, Dec. 10, gives a rather restricted meaning to these oft-used words. He held that, when added to letters they only mean that in the event of the negotiations carried on by those letters not resulting in any agreement, nothing is to be taken as an admission. Where letters written "without prejudice" contained an undertaking upon certain terms which were agreed to by the other side, and afterwards the parties giving the undertaking wished to introduce a fresh condition. the original undertaking was enforced.—*Law Times.*

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DIARY FOR FEBRUARY.

17. Fri..... William Osgoode, first C. J. of U. C., died 1824.
18. Sat .... Hilary Sittings end.
19. Sun.... *Quinquagesima Sunday.*
21. Tue.... Shrove Tuesday. Supreme Court Session begins.
22. Wed.... Ash Wednesday. First day of Lent.
26. Sun.... *Quadragesima Sunday.*
27. Mon.... Sir John Colborne, Administrator, 1838.
28. Tue.... Indian Mutiny began, 1857.

TORONTO, FEB. 15, 1882.

THE Attorney-General has introduced an Act for simplifying the practice of conveyancing and amending the law of property. It seems to be a reprint, to a great extent, of Lord Cairns' Act, now in force in England. It reaches us too late for further notice at this time.

CHIEF JUSTICE WILSON has held, in *Re Squier* (see *post* p. 74) that the Court of Impeachment for the trial of complaints against County Judges is still in existence, the Act of the Local Legislature assuming to abolish that Court being *ultra vires*. This was the view expressed by an able contributor in an article published in this journal, at p. 445 of last volume.

THERE appears to be only one opinion as to the complete success of the conversazione on Tuesday last, and we may all be proud of the fine appearance both the old building and the new Convocation Hall presented. We print in another column the address presented by the Chairman of the Building Committee and Mr. Edward Blake's reply. Of course most of the credit is really due to two or three specially active members of the committee, whom it would not be difficult to single out. However, like the Oxford man who, in his Divinity examination, was asked to give the names of the major and minor prophets,—we object to invidious distinctions. It is to be hoped so long a period will not again elapse before the Law Society feel justified in giving another "Jamboree"—to use a word which has now received judicial authority in this connection. Possibly the accession of an Edward VII. or an Albert I. to the throne of the British Empire, may afford the next occasion.

THE GUITEAU TRIAL—JUDGE COX'S CHARGE.

It is interesting to read Judge Cox's charge to the jury in the Guiteau trial, in connection with the chapter on "Law and Insanity," or the legal view of responsibility in regard to insanity, in Dr. Maudsley's "Responsibility in Mental Disease," published among the International Science Series. The writer comments severely on the mistaken views of the subject taken by the Courts, and on the answers given to the House of Lords by the Judges in connection with the McNaughton trial in 1843. He gives the substance of those answers thus: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." To this, so far, Dr. Maudsley does not greatly object, for he admits it will, if strictly applied, cover and excuse many acts of insane vio-

lence, for of few insane persons who do violence can it be truly said that they have a full knowledge of the nature and quality of their acts at the time they are doing them. But at the same time he observes that it is calculated to mislead a jury, who are very likely to be misled by the existence of a general knowledge of right and wrong in the accused person, to judge wrongly concerning his knowledge of the particular act at the time. He, however, objects strongly to a formidable exception by which the Judges limited its application. In reply to the question, "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?"—the Judges declared that "on the assumption that he labours under partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." "Here," says Dr. Maudsley, "is an unhesitating assumption that a man, having an insane delusion, has the power to think and act in regard to it *reasonably*; that at the time of the offence he ought to have and to exercise the knowledge and self-control which a sane man would have and exercise, were the facts, with respect to which the delusion exists, real; that he is, in fact, bound to be reasonable in his unreason, sane in his insanity." These answers of the Judges to the questions put to them by the House of Lords have, he asserts, been unanimously condemned by all physicians who have a practical knowledge of the insane, while the Judges of other countries condemn them with equal earnestness; but since that time the law as relating to insanity in a criminal trial has, in England, been laid down in conformity with their conclusions. The American Courts, however, he asserts, which having inherited the Common Law of England, at first followed docilely in the wake of the English Courts, are now exhibiting a disposition to emancipate themselves from an authority which they perceive to be founded on defective and erroneous views of insanity, and a desire to bring the law more into accordance with the results of scientific observation; and amongst other extracts from the American reports, he cites, as an example, the following passage from the instructions of Chief Justice Perley to the jury, in the case of *State* v. *Pike*: He told the jury that they should return a verdict of not guilty, "if the killing was the offspring of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and in escaping or avoiding detection, nor ability to recognize acquaintance, or to labour and transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury." Finally Dr. Maudsley expresses his opinion that the question which will probably be submitted to jury, when the matter is correctly understood, will be: "Was the act the offspring or product of mental disease?" And it will be seen that to lay down any so-called test of responsibility founded on a supposed knowledge of right and wrong, is, as Judge Ladd remarked in the American case of *State* v. *Jones*, "an interference with the province of the jury, and the enunciation of a proposition which, in its essence, is not law, and which could not in any view safely be given to the jury as a rule for their guidance, because, for ought we can know, it may be false in fact."

The reader of Judge Cox's charge in the Guiteau case will see that he seems, as it were, to hover between the more specific form of question for the jury, which accords with the English rule, and the more general form of question which Dr. Maudsley advocates. Thus he said in one part of his instructions:—

"If the accused had sufficient use of his reason to understand the nature of the act with which he was charged, and to understand it was wrong for him to commit it, he was criminally responsible for the act, whatever peculiari-

ties might be shown by him in other respects. On the other hand, if his reason were so defective in consequence of brain disease, that he could not understand what he was doing or could not understand that what he was doing was wrong, he ought to be treated as irresponsible."

But elsewhere we find him putting the matter as follows:—

"Whenever this partial insanity was relied on for a defence, it must appear that the crime charged was the product of a delusion or other morbid condition, and connected with it as the effect with the cause, and that it was not the result of sane reasoning which the party might be capable of, notwithstanding his limited and circumscribed disorder. Assuming that infirmity of the mind had a direct influence on the crime, the difficulty was to fix the character of the disorder which fixed responsibility or irresponsibility in law. The test was whether the conduct of a man and his thoughts and emotions conformed with those of persons of sound mind, or whether they contrasted harshly with those.

* * * * * * *

"The subject was treated to a limited extent in judicial dicisions, but more was learned from works on medical jurisprudence and expert testimony.

* * * * * * *

"The question for the jury to determine was, What was the condition of the prisoner's mind at the time this project was executed? If he were sufficiently sane then to be responsible, it mattered not what might have been his condition before or after. Still, evidence had been properly admitted as to his previous and subsequent condition, because it threw light prospective and retrospectively on his condition, inasmuch as these disorders were of gradual growth and indefinite continuance. If he were insane shortly before or shortly after the commission of the crime, it was natural to infer that he was so at the time. But still all the evidence must centre around him when the deed was done. The jury had heard a good deal of evidence respecting the peculiarity of the prisoner through the long period of time before this occurrence, and it was claimed on the part of the defence that he was during all this time subject to delusions. The jury must determine whether at the time the act was committed the defendant was labouring under any insane delusion prompting and impelling him to do the deed."

It certainly does seem clear that the question whether a man is sufficiently sane to be rightly held responsible for any particular act committed by him, is a question of fact and not of law; that the correctness with which this question of fact can be answered must depend on the stage which scientific knowledge has attained to at the time of answering; and that like other questions of fact, it should be left to the decision of the jury, aided by expert testimony, and unhampered by what an American Judge calls defective medical theories usurping the position of common law principles.

RECENT DECISIONS.

We can now at length proceed to consider the cases in the voluminous December Number of the Chancery Division Law Reports, Vol. 18, pp. 297—710.

The first case in *re Knapman*, *Knapman* v. *Wreford*, concerning costs incurred by an executor in a Probate action brought by legatees, has been already noted among our recent English Practice Cases, 17 C. L. J., 414, the note there being taken from 45 L. T. 102 where the case is also reported.

CHARITY CY-PRÈS

Of the next case, *re Campden Charities*, p. 310, it is sufficient to say that it illustrates the doctrine of cy-pres as applied to the application of a charitable bequest under the altered circumstances brought about by a great lapse of time.

RAILWAY DEBENTURES—PRIORITY.

The next case *Harrison* v. *Cornwall Minerals Ry. Co.*, p. 334, was a special case to settle the priorities of debenture stock issued by a railway company at different periods under three several special acts.

ADMINISTRATOR—FOREIGN ASSETS—COSTS.

In *Eames* v. *Hacon*, p. 347, the plaintiff had been appointed administrator in Ireland, and

part of his intestate's assets being in India, he sent out a power of attorney to F. & Co., a firm there, who procured letters of administration to be granted to them there for the use and benefit of the plaintiff, received the Indian assets, paid the Indian debts, and remitted the surplus to their agents in England. The Irish letters having been duly sealed in England, the Court of Appeal held that the said agents were bound to hand over the fund to the plaintiff, and could not require the concurrence of the next of kin, since the latter had not taken any proceedings to prevent the plaintiff from receiving the assets. Jessel, M. R., said: "Assets collected by the agent of a trustee have often been intercepted in the agent's hands by the *cestuis que trust*, but if they take no steps for that purpose the agent is safe in paying the trustee. So here, because F. & Co. might be sued by the next of kin, it does not follow that they cannot, when they have not been sued, hand over the money to the plaintiff. The two propositions are not correlative;" and the money in question being admittedly an ascertained surplus, the principal administrator was held entitled, as is generally the case, to call on the limited administrators to pay it over. Moreover, though the defendants, the limited administrators had acted under advice, yet as they had chosen to raise technical objections as to so small a sum, they were ordered to pay costs.

CONSTRUCTION OF DEEDS—COVENANTS.

Of the next case, *Dawes* v *Tredwell*, p. 354, it seems only necessary to say that it is one on the construction of deeds, decided on the principle that where the operative part of deed is clear, a recital cannot control it, and that it illustrates the rule that "where you have such words as 'it is hereby agreed and declared between and by the parties to these presents,' that some one will do an act or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them;" (per Jessel, M. R.) And so a husband having thus covenanted in a marriage settlement to do all things necessary to bring after acquired property of the wife into settlement. it was held this covenant by him could not be held to relate to property over which he had no power and in which he had no interest, and that the wife, therefore, was not bound to bring into settlement property given to her separate use.

SPECIFIC PERFORMANCE—DOUBTFUL TITLE.

We can now proceed to *Palmer* v. *Locke*, p. 381, which was an action by the vendor for specific performance of a contract for the sale of a certain residuary personal estate, which had been paid into Court. The vendor failed to comply with a requisition by the purchaser for particulars as to a certain stop order obtained by one E. and for the discharge of E's interest by the vendor, saying that he did not know the required particulars and that his deed over-rode E.'s incumbrance. But the Court of Appeal refused to force the title on the purchaser on the general doctrine "as laid down by a long series of decisions of Judges of the greatest eminence," determined before, but explained in *Pyrke* v. *Waddingham*, 10 Ha. 1, that: "When the Court finds, according to the principles explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought to be forced upon the purchaser, it is neither necessary, nor generally convenient or desirable that the Court, whatever may be the opinion it has formed upon the question, and on the materials presented in a suit for specific performance, should think that that should conclude all questions as against persons who are not before it;" (per Lord Selborne, L.C.) Therefore the Court held it was enough to consider whether there were not serious grounds for doubting that the title of E.'s mortgage ought to be considered to be a thing in which the purchaser had no concern, and in the opinion of the Court there were such serious grounds.

RECENT DECISIONS.

TRADE MARK—TENDENCY TO DECEIVE.

The next case, the *Singer Manufacturing Co.* v. *Long*, p. 395, has a special interest at the present moment from the fact that another of the same kind, on a bill filed by the same plaintiffs is awaiting hearing before Ferguson, V. C., in the Chancery Division. In the English case the plaintiffs, who use the word "Singer," as a designation of all the sewing machines manufactured by them accompanied by specific words to distinguish different kinds, but who have no longer any patent rights in connection with such manufacture, sought to restrain the defendant from selling sewing machines, which he described in his invoices, price lists and circulars as being made on the Singer system and the like, with explanations showing that they were made in Berlin. The question of law was a simple one, the judgments being mainly concerned with discussing the question of fact. In the Court of Appeal, James, L. J., says, p. 412:—"Upon the question of law which is involved, there is, to my mind, no dispute whatever. I have often endeavoured to express what I am going to express now, * * * that is, that no man is entitled to represent his goods as being the goods of another man: and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser, who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent or in the use of any name. Whatever name is used to designate goods, any body may use that name to designate goods: always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law." The other two judges of Appeal, Cotton, L. J., and Lush, L. J., concurred in this statement of the law, the former pointing out, as does also Bacon, V. C., in the Court below, that there was no necessity to show any fraudulent intention in the use of circulars, etc., complained of. "Who ever heard," says Bacon, V. C., p. 403, "that a Court of Common Law had any jurisdiction over 'moral' fraud, for it is moral fraud which we are talking of now. In an action of trespass on the case the Court has nothing to do with fraud." But it will be observed that the Court of Appeal herein dissent from Bacon, V. C., in so far as he says, p. 402,—"The plaintiffs say, 'We are the owners of property, the defendant has injured our property, and we desire that the law should redress that injury.' That is the whole case;" and adds,—"I take it to be very old law. I do not think it is necessary to refer to any modern cases to show that a man's trade mark is his property, and I do not know that his trade name differs in the character of property from his trade-mark," referring to *Sykes* v. *Sykes*, 3 B. & C., 541. Lush, L. J., says distinctly, p. 424,—that the plaintiffs have not "any right of property in the name 'Singer' in the sense in which they seek to use it, viz., in the sense that they can restrain every competitor using the word 'Singer' as descriptive of the kind of machine, however he may qualify or explain it. There is no such thing, to my mind, as a property in a word in that sense. What they have a right to require is that which is common to every manufacturer of goods, viz., that no competitor shall be at liberty to attempt to put off goods of his own manufacture as being the manufacture of another."

RAILWAYS—SALE BY TRUSTEES—POWERS.

The next case, *Peters* v. *Lewes and East Grinstead Ry.*, p. 429, raises some important questions under the Imperial Lands Clauses Act 1845, sects. 7, 9 (*cf* R. S. O. c. 165, sect. 13, and sect. 20, subs. 4), and, though unnecessary for the decision of the case,

contains some remarks by Jessel, M. R., on what he calls "a very curious point indeed," viz., as to the time during which a power of sale given by a will will last. The Court of Appeal decided in this case (i) that where trustees under a will profess to sell the land of their testators to a Railway under the provisions of the Imp. Lands Clauses Act, the validity of the sale must be determined without reference to any power of sale, which they may possess under the will of the testator; (ii) that trustees of land for *femes covertes* who are absolutely entitled for their separate use are not persons competent to contract with a railway company for the sale of the land under Sec. 7 of the said Act (R. S. O. c. 165., s. 13); (iii) that where trustees selling to a railway appoint one of themselves as surveyor to value the land under the Act, the sale will be invalid. The principal judgment is that of Jessel, M. R., who as to (ii) observed, p. 437, after reading the section empowering trustees to sell and convey,—"It is on behalf of a *cestui que trust* under disability– a person who cannot convey--and that is the reason why nobody has dreamt of applying it to a bare trustee for a man. The same thing must apply to a bare trustee for a woman who is entitled for her separate use free from restraint on anticipation, etc."; while as to (iii) he says that the whole theory of the Act is that an independent person is to be called in.

In discussing the point as to the time during which a power of sale given by a will will last, the M. R. observes, that in order to limit powers of sale, though framed in general terms, so as to bring them within the general rule, --that you cannot have a power of sale to change the nature of the interests limited by the instrument so as to exceed the limit of time prescribed by the rule against remotness or perpetuity,--the Courts have decided that these powers are limited by the nature of the limitation sustained in the settlement or will, so that when, by reason of the expiration or cesser of the limitations contained in the settlement the absolute interests come into existence, then the power is considered to be at an end. But he adds, although a general power, exerciseable at any period, of course, would be bad in law, there may be a valid power even where there are nothing but absolute limitations of interests given in the first instance, or in other words, where the power is to take effect on the coming into existence of the absulute limitations, and this though there be a preceding life estate. Thus a limitation to a person for life, and after the death of the tenant for life, upon trust to divide among my twelve children, with power, for the purpose of division, to sell, would not be void, for the trustees are bound to make a division within reasonable time, the power "is limited from the nature of the purposes for which it is to be used." We may add that the very next case affords an example of an invalid power of sale; (see page 446-47).

WILL.- GIFT TO CLASS.—REMOTENESS.

Of the next case, *Goodier* v. *Johnson*, p. 441, it is only necessary to say that the Court of Appeal there decided that a gift to all the children of A. and B., and the issue of such as may be dead at the time of distribution, could not –at any rate when the other clauses of the will were considered– be treated as a gift to such of the children as are then living, and the issue of such of them as may be then dead,—but that it was a gift to all the children of A. and B., with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue. And we may add the case also illustrates the rule that when the gift over of any share is void for remoteness, this does not affect the original gift.

SOLICITOR AND CLIENT– MORTGAGEE IN POSSESSION.

Cockburn v. *Edwards*, p. 449, illustrates the care a solicitor must use where he lends money to a client on mortgage, not to draw the mortgage deed in an unusual form without fully explaining it to the client. All the judges of the Court of Appeal deprecate the practice of solicitors lending money to clients.

In this case the power of sale in the mortgage did not contain the usual proviso that notice should be given, or the interest should be three months in arrear; and as it was not shown that the mortgagee explained to his client that the power was not in the usual form, it was held (i) that a sale under the power was an improper sale unless it could be shown that some interest was three months in arrear; and (ii) also that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest, would not by itself prove that there was no interest in arrear if no appropriation was shown to have been made. As to the first point the M. R., indeed, expresses an opinion, (p. 456,) that as the client had a right to be informed what the terms were upon which the estate could be sold, the absence of such information was of itself sufficient to make the sale improper, whether there was interest in arrear or not; while as to (ii), he says:—"A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest, but till an account is taken there is no set-off, there is no appropriation of the rents," and he declares the dictum wrong in *Brocklehurst* v. *Jessop*, 7 Sim. 438, that receipt of rents is *prima facie* payment. It was also held (iii) that the difference between party and party costs, and solicitor and client costs, of the present action could not be given to the plaintiff by way of damages, as Brett, L. J., says, p. 462:—"The law considers the extra costs which are disallowed on taxation between party and party as a luxury for which the other party ought in no case to be liable, and they cannot be allowed by way of damages."

Passing by *Parker* v. *Wells*, p. 477, a case on the subject of discovery, which we noted among our recent English Practice cases, supra p. 44, we reach *Ex parte Best, in re Best*, p. 488.

BANKRUPTCY—PRESENCE OF DEBTORS AT CREDITORS' MEETING.

Here it was decided that the meaning of section 126 of the Imp. Bankruptcy Act, 1869, which requires that "the debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present" at the meetings of his creditors to consider a proposed composition, (compare Insolvent Act, 1875, Dom. s. 23), is that the debtor must, as a rule, be personally present at such meetings, and that it is not sufficient that he should be in a room immediately adjoining that in which a meeting is held, ready to be called in if the creditors wish to examine him, even though the creditors are informed of this.

Ex parte Williams, p. 495, is another case under the Bankruptcy Act, in which it was held that when the Registrar is satisfied, either from the small amount of composition offered or otherwise, that resolutions accepting a composition have been passed in the interest of the debtor, and not for the benefit of the creditors, it is his duty to refuse to register them, under s. 126 of the Imp. Act, 1869, even though no creditor opposes the registration. It seems well to note this decision as it might be held to apply to the case where the Court or Judge is applied to to confirm a proposed composition and discharge, under s. 54 of our Insolvent Act, 1875.

POWER OF APPOINTMENT—WILLS ACT.

The next case *Freme* v. *Clement*, p. 499, raises "an entirely new point," and one which the M. R. consequently decides upon principle, "that is, principle to be extracted from former decisions, from the general rules of the Court, and from the nature of the law." Without attempting to sketch his somewhat elaborate reasoning, it seems sufficient to say that the new point thus decided is as follows:—An instrument exercising a special or general power of appointment over property must be executed and construed according to the rules for the time being applicable to instruments of that kind, although the power may have been created before but exercised after, an alteration in the law as to the construction and mode of execution of

such instruments. Furthermore, after going through every section which has any bearing on the question, the M. R. in this case arrives at the conclusion that, having regard to all these numerous sections, the word "devise" in the Wills Act, Imp. 1 Vict., c. 26, (R.S.O. c. 106), includes, unless a contrary intention appears by the will, a devise by way of appointment under a special or a general power conferred on the testator as to property not his own; consequently, it is so to be read in the 25th section, (R. S. O. c. 106, s. 27), and so a devise of real estate by way of appointment which fails or is void, falls into the residuary devise (if any) by way of appointment. In the course of his reasoning on this latter part of the case he observes, p. 510, "It must be remembered that, after all, every will is in exercise of a power, not technically but generally. It is a power given by the Legislature to a man to direct what shall become of his property after his death. It is a mere power." And moreover, at p. 508, is a dictum which seems worth special note, viz.:- "If we can fairly construe an Act so as to carry out what from the nature of the case must obviously have been the intention of the Legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, we ought to adopt that interpretation which will make the law uniform and will remedy the evil which prevailed in all the cases to which the law can be fairly applied."

A considerable portion of the December number of the Chancery Division Law Reports still remains for review. Fortunately, however, the recent January instalments are very brief, and therefore we may hope, in our next number, to bring this review up to date.

SELECTIONS.

LORD JUSTICE LUSH.

The death of Lord Justice Lush will be regreted, both on personal and public grounds. A lawyer who has made his way to the highest judicial offices solely through his individual merits, is always looked upon with favour by his contemporaries, and none the less when he has won his success step by step in the law without the sudden upward push which politics are apt to give, and when his career has begun almost at the very bottom of the professional ladder, as an articled clerk in a solicitor's office. Besides these elements of popularity, the late judge possessed an energy and rapidity in his work, combined with a perfectly forensic habit of thought and manner, which made him one of the most desirable of judges before whom to try a cause. He could be relied upon to show no caprice or crochet, and to do his judicial work with a fairness and patience which inspired confidence in all concerned. But his businesslike capacity in Nisi Prius and in courts of practice have been lost to the public since he was more than a year ago raised to the Court of Appeal. His elevation was a well-peserved compliment, just as his admission to the Privy Council was a recognition, tardily made, of his services. But in the Court of Appeal the late Lord Justice has been looked upon, less as likely to illuminate the law by judgments which would last, than as one of the few judges able by his experience to carry the traditions of the past into the present. It would seem as if the new system were having a fatal effect on our judges. With the exception of Lord Blackburn, who was raised to the bench three years after the late Lord Justice, there is now no occupant of the bench created since 1868, and nearly half the judges have been made since the Judicature Acts came into operation. Lord Justice Lush's presence on the bench was one of the links with the past system of procedure, now rapidly becoming fewer and fainter, and his death leaves a gap impossible to fill.

The career now brought to a close has a consistency about it which makes it not difficult to estimate. If he had a fault on the bench, it was over-confidence in his opinion, and tenacity of the view once formed. When

made a serjeant, he chose *Tenax justitiæ* as his motto, and thus aptly and, perhaps, consciously expressed his own character; for *justitia* can only mean the view of law and justice held by him who is described as tenacious. This quality—which rendered it sometimes difficult to dislodge an opinion formed, it might be, on insufficient knowledge—although in his way on the bench, was of the highest use to him at the bar, where the necessity for speedy action makes a rapid judgment essential. This characteristic, combined with an acknowledged superiority in practice, an excellent knowledge of law and great fluency of expression, was the cause of his success at the bar. His cases were naturally those which are known as 'heavy causes,' in which sterling qualities, as well as tact and knowledge of the world, are required, but in which verdicts are not won by eloquence or strokes of genius. On the bench his best title to fame is that he was the most perfect Nisi Prius judge of his time. His briskness was communicated to counsel, witnesses, and jurors without ever degenerating into hurry. The tenacity already referred to did not display itself in the appreciation of facts, and on points of law was tempered by complete candour when once an opinion was shown to be unfounded. Mr. Justice Lush did not possess the smallness of mind which makes some ashamed to retract an opinion. He had too much confidence in his own reputation for any such weakness. On the hundred and one collateral questions which arise in a trial of any complication, he gave his decision rapidly, and, what was more, was generally right. The ease with which he fell into the trial of criminal cases is often quoted as an example of adaptability. Until he was made a judge, Mr. Justice Lush had never, it is said, seen the inside of a Criminal Court, and yet after a very short time he was equally efficient in trying prisoners as at Nisi Prius. He saw the crucial point of the evidence with marvellous quickness, kept the case within its due bounds without any appearance of impatience, summed up shortly and clearly to the jury, and dismissed the prisoner, if there was a conviction, with a few practical words of warning. Few could discover, from seeing Mr. Justice Lush on the bench, that he was a man of deep religious feeling and a preacher at the Baptist Chapel in the Regent's Park which he attended. He knew his business too well to preach in Court; and the only point at which his religious opinions can be said to have come to the surface was in the form of words used by him in sentencing to death. Instead of the usual form at the end of the statutory sentence, 'And may God have mercy on your soul!' Mr. Justice Lush would say, 'And may you be led to seek and find salvation!'

The late Lord Justice will not take the highest rank among the lawyers of the past. It was as a practical worker that he must be judged. He wrote books, but none of them have survived. A reputation as a legal writer can hardly be made on the sandbank of procedure, although a successful look on Practice may give a push to a lawyer's success. All that can be said of the late Lord Justice's books is that they were valuable in their time, but they are permanent neither in subject nor treatment. A similar observation might with some truth be made on his judgments. He did not leave his mark in any branch of the law, although he did good service in all branches. Possibly it would have been a more fitting termination to his career if he had died a judge of first instance. He was made a judge of appeal too late, when the elasticity of his mind had begun to fail. Possessed of a good knowledge of equity, he might at an earlier period of his life have done as good work in deciding Chancery appeals as he had already done in other departments of the law. But partly from the cause already assigned, and probably still more from the loss of his wife, which took place early in the year, Lord Justice Lush did not appear at home on the bench of the Court of Appeal, especially in hearing Chancery cases. Some signs of failure were visible last summer assizes, when he appeared to have lost a part of his vivacity and acuteness of perception. Recently he showed an appearance of physical breaking up, alarming to all who had known him long. The result justified the fears then felt. He has left behind him as high a reputation as any judge may wish to leave for singleness of purpose and honest and efficient labour in the high station which he filled.—*Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Wilson, C. J.] [Jan. 27.

RE SQUIER.

County Judge—Misconduct—Commission of Enquiry—Prohibition.

Enquiries under 22 Geo. III, ch. 75, must be before the Governor General in Council, and without oath.

The authority to enquire cannot be delegated, nor enquiry under oath authorized by commission.

The commission to enquire is not a common law right where it constitutes a tribunal to hear and enquire, which does not determine.

The Act of the Ontario Legislature assuming to abolish the Court of Impeachment, created by the Consolidated Statutes of Upper Canada, is *ultra vires*.

McCarthy, Q. C., for the motion.

Robinson, Q. C., contra.

Wilson, C. J.] [Feb. 3

MORRISON v. TAYLOR.

Judgment before appearance—Rule 324, O. J. A.

Judgment under Rule 324 (a) cannot be ordered by a Judge in Chambers to be signed, but resort must be had to the Court.

Rose, McDonald & Merritt for application.

Caswell, contra.

COMMON PLEAS DIVISION.

Cameron, J.]

LIGHTBOUND v. HILL.

Judgment — Estoppel — Insolvent Act, 1875, sec. 136.

Where judgment was recovered for a debt, without fraud being charged, under sec. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action charging the fraud, even although the judgment was recovered by default, for the plaintiff might, instead of signing judgment, have declared averring such fraud, and had the question tried.

Quære, whether, where an insolvent's estate vested in an assignee under the Insolvent Act before its repeal, the action for the alleged fraud commenced after such repeal, was a proceeding that might be continued thereunder under the terms of the Repealing Act, 43 Vict. ch. 1, D., or was protected by the Interpretation Act, 31 Vict., ch. 1, D.; and whether also the said sec. 136 was *ultra vires* of the Dominion Parliament?

J. K. Kerr, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

CHANCERY DIVISION.

Proudfoot, J.] [Jan. 27

HENDRIE v. BEATTIE.

Practice—Injunction—Undertaking by plaintiff

On a motion to vary minutes of an order nothing can be done at variance with the order pronounced, though additions or variations may be made so as to carry out the intention of the court when pronouncing it.

By arrangement between the parties an injunction was granted to restrain the defendants, the one from handing over, and the other from receiving the Toronto, Grey and Bruce Railway. In drawing up the order the defendants desired to have inserted an undertaking of the plaintiff's not to do anying with the railway, which the Registrar declined to introduce into the order. On motion to vary the minutes the Court (Proudfoot, J.) refused to insert such an undertaking, but delayed the issue of the order for ten days so as to afford the defendants an opportunity of making a substantive motion to obtain the desired relief.

E. Blake, Q.C., for plaintiff.

McCarthy, Q.C., for defendant.

Proudfoot, J.] [Jan 25.

KING v. HILTON.

Liability of one executor for acts of another.

A testator named two executors, one of whom, his brother J., took upon himself the active management of the estate with the knowledge and consent of his co-executor. J. applied

moneys of the estate to his own use, and the Master at ——— charged the co-executor C. with the amount so misapplied by J. On further directions the Court (Proudfoot, J.) reversed such ruling of the Master, and declared that C. could not be held liable for this default of J.

Winchester for plaintiff.

Hall for defendant.

Proudfoot J.] [Jan. 26.

INGLEHART V. GAGNIER.

Vendors' and Purchasers' Act—Building Society.

The plaintiffs—the president and treasurer of a building society—took a mortgage which they accepted without affixing the seal of the society thereto:

Held, that the fee was vested in these officers of the company, and they could make a good title to a purchaser at a sale under the power contained in the mortgage, and the purchaser was bound to accept such title.

Dingwall for petitioner.

Furlong for respondent Curtiss.

Proudfoot, J.] [Jan. 26.

JOSEPH V. HAFFNER.

Insolvency—Practising attorney dealing in lands.

C., a practising lawyer, dealt to a large extent in lands, and having become involved in such dealings, proceedings were taken against him in insolvency, and the defendant was appointed his official assignee. The plaintiff having some years previously purchased a mortgage created by C., instituted proceedings to foreclose the equity of redemption.

Held, that C. was not subject to the Insolvency Acts; that the equity of redemption was still vested in him notwithstanding the insolvency proceedings; and that the objection could be taken at the hearing of a motion for judgment by a party interested in a portion of the property sold to him after the creation of the mortgage.

Rae for plaintiff.

H. Cassels for defendant Dickson.

CHAMBERS.

Mr. Dalton, Q. C.] [Jan. 17.

DOCKSTADER V. PHIPPS.

Counter-claim.

Action by an infant to recover as heiress of her mother possession of certain land leased by her deceased father to the defendant for a term of years not yet expired, and for mesne profits for the occupation of the land since the death of the father. The defendant set up a years' tenancy, and alleged that the plaintiff's claim for mesne profits had been satisfied by two successive distresses for rent, and set up a counter-claim making the bailiff a party, and claiming damages against the plaintiff and the bailiff for illegal distress.

Held, on a motion to set aside the counter-claim as embarrassing, and as not so connected with the subject matter of the original action as to be a proper counter-claim within sec. 16 ss. 4, O. J. A., that the counter-claim was good. Motion dismissed with costs to the defendant in any event.

Hoyles, for motion.

Maclennan, Q.C., *contra*.

Osler, J.]

IN RE ELLIOT—(A SOLICITOR).

Solicitor—Taxation—Costs.

Where an order has been made referring a solicitor's bill for taxation, and directing the attorney to refund what, if anything, has been overpaid him, it is proper to obtain a subsequent express order for payment of the balance found due by the Master's report.

Aylesworth for the solicitor.

Shepley for the client.

Cameron, J.] [Jan. 18.

MACFIE V. HUNTER.

Interpleader—Division Courts—Execution—Chattel Mortgage.

An interpleader order had been made which directed the Sheriff to pay over to the claimants $1000 and interest, the proceeds of the sale of goods claimed by them under a chattel mortgage which was not impeached. The order directed an issue as to a second chattel mortgage held by the claimants, the execution creditors contending that it was fraudulent. A. & Co.

obtained execution in a Division Court against the execution debtors after the date of the order, and moved to vary it by directing that the amount of their execution debt should be retained by the Sheriff out of the $1000, until garnishee proceedings against the debtor in the Division Court, in which the Sheriff was garnishee, should be disposed of.

Held, that the moneys in the Sheriff's hands belonged to the claimants, the chattel mortgagees, as on a sale of the mortgaged chattels by them as mortgagees; that there being no want of *bona fides* in the mortgage, no want of formalities in the same would make it invalid as between the parties thereto, so as to entitle the debtor to claim the money secured thereby, or to entitle A. & Co thereto under their execution.

Held, that the terms "*fieri facias*" and "warrant of execution," used in the Division Court Act, are convertible terms.

Held, that the term "execution creditors," used in the 11th section of the Interpleader Act, includes parties holding executions in the Division Courts, who are therefore proper parties to, and should be called upon in, an interpleader application by a sheriff.

Aylesworth for the application.

Langton for the claimants.

Ogden for the sheriff.

Mr. Dalton;—Proudfoot, J.] [Feb. 6.

SEVEWRIGHT V. LEYS.

Appeal—Costs—Rule 427, O. J. A.

The defendant, supposing that the Christmas vacation did not count in the time for appealing from a report of the Master in Ordinary, did not bring on the appeal within the time required by Rule 427, O. J. A. Discovering the mistake before the whole time had expired, he offered to expedite matters in every way in his power.

The offer was declined. The Master in Chambers allowed the appeal on payment of costs. On appeal,

PROUDFOOT, J., affirmed the Master's judgment, but ordered the defendant to pay into Court the amount found due by the report, as a condition precedent to the appeal, and the payment by the defendant of the costs of this appeal.

Black for plaintiff.

Hoyles and *Kingsford* for defendant.

Wilson, C. J.] [Jan. 20.

NAPIER V. HUGHES.

Security for costs- Appeal—Foreign plaintiff.

Plaintiffs, who resided in England, obtained a verdict for the price of goods in defendants' possession. The defendants appealed to the Court of Appeal. Plaintiffs applied for payment out of the $300 paid in by them as security for costs on commencing the action.

Held, that as the plaintiffs were shown to have goods in the country and in the defendant's possession, the $300 should be paid out.

Howard, for plaintiffs.

Millar, for defendants.

Mr. Dalton.] [Feb. 2.

CORNISH V. MANNING.

Time, computation of—Execution—Summons.

A defendant was served on the 22nd December, and a *fi. fa.* was issued on the 10th January.

Held, that the *fi. fa.* was not isued too soon, and might have been issued on the 9th January.

Held, that in the computation of time in this case Sunday counts.

The ten days for appearance mentioned in writ of summons includes the first day.

Holman for plaintiff.

H. J. Scott for defendant.

Mr. Dalton; Boyd, C.] [Jan. 24, Feb. 1.

CASWELL V. MURRAY.

Security for costs- 29-30 Vict., cap. 42, O.

Motion for security for costs under 29-30 Vict., cap. 42, O. The statement of defence had been filed.

It was contended that a former bill had been filed and then dismissed with costs, and that this was another bill for the same cause of action.

The first bill set out that the plaintiff had been induced by the false and fraudulent representation of one Brown and his daughter, to marry the daughter, upon the supposition that her husband was dead, whereas her husband was not dead, and the plaintiff in consequence went through the form of marriage with her, and they lived together as man and wife: that the plaintiff, by the solicitation of Brown, made a

large expenditure upon property, which Brown was to convey to the plaintiff and his supposed wife: that afterwards the intended wife left the plaintiff, and the title to the property being in Brown, the plaintiff prayed that his expenditure so made upon the false and fraudulent representations of Brown, upon the said property might be declared a lien thereon, and the property sold to realize the money, etc., which should be paid to the plaintiff.

Brown died, and the second suit—this suit against his executors—contained all the same facts as to the expenditure by the plaintiff under the false representation of Brown, with the further statement that Brown agreed, after the supposed wife had left the plaintiff, that upon three years profits of the premises being left to him he would convey the land to the plaintiff, and the plaintiff claimed specific performance and prayed for an account as to the rents and profits from a specified date, of that agreement, and concluded with the general prayer for further or other relief.

The costs of the first suit had not been paid.

Arthur v. *Brown*, 3 C. C. R. 396; *Thompson* v. *Caledon*, 3 C. C. R. 15; *Smith* v. *Day*, 2 C. C. R. 456; *Lovell* v. *Wardroper*, 4 P. R. 265; *Robertson* v. *McMaster*, 8 P. R. 14; *Dean* v. *Lumprey*, 2 C. C. R. 202; Arch. P. 13 ed. p. 1153; *Pendry* v. *O'Neil*, 7 P. R. 52, were cited.

Mr. DALTON, Q.C.—Under the statute, when the same cause of action is spoken of, it means substantially the same, and it cannot make a difference that something further is added, or else the statute could always be defeated by a very simple contrivance. It seems to me that the cause of action in the second suit is substantially the same as the cause of action in the first suit. Any difference that exists I do not consider fatal. As to the time for applying I think, where the defendant has but eight days after the delivery of statement of claim from which he first learns the plaintiff's position, it is more convenient that the defendant should be at liberty to apply for security at any time before issue joined.

Order made.

On appeal.—BOYD, C.—In addition to the cases cited, referred to *Doolan* v. *Martin*, 6 P. R. 319; *Bell* v. *Cuff*, 4 P. R. 157, and *Hodgson* v. *Graham*, 26 U.C.R. 127. Without deciding as to the time for applying for security, he discharged the order made in Chambers, holding that the causes of action were distinct and different. He allowed the plaintiff the costs of the appeal and of the application below, if he undertook not to seek relief by way of lien on the land for improvements, if he fails in the main case presented by his statement of claim.

Hoyles, for defendants, (respondent).

Meek, for plaintiff, (appellant.)

REPORTS.

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

FRANCIS V. FRANCIS.

Motion for judgment under Rule 324— Special circumstances to be shown — Conflicting affidavits.

Where there were cross actions, in one of which a sum had been reported due and a claim of set off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was *held* entitled to move for judgment under Rule 324.

But the affidavits filed on the motion being conflicting, *held*, the action must be entered for trial at the sittings for examination of witnesses, but the amount found due in the first action was ordered to be paid into Court to abide the result of the second action.

[February 7.—Proudfoot, J.

This was a cross action to recover a debt due from defendant. Another action to wind up a partnership was pending between the same parties. In taking the accounts in that action the claim now sought to be recovered had been proved and allowed at $668, in the Master's office, but disallowed on appeal from the report on the ground that it was not proper to be taken into consideration in that action, and the report was referred back; and in consequence of the disallowance of the set off, $889 was found due from the present plaintiff to the defendant as the result of the taking of the partnership accounts. The present action was then brought to recover the $668. The defendant was resident out of the jurisdiction, and the plaintiff swore that unless he was entitled to set off one

claim against the other *pro tanto* he would be in danger of losing his debt *in toto*, as the first action was shortly to be heard on further directions, and he was apprehensive he would be ordered to pay the amount found due in that action to the defendant. Affidavits were filed in support of, and in answer to the motion, but they were conflicting as to the question of the alleged indebtedness.

Hoyles, for plaintiff, moved for judgment under Rule 324, pursuant to leave obtained from Proudfoot, J.

Walter Cassels, for the defendant.

PROUDFOOT, J.—It has been decided that in motions for judgment under Rule 324 special circumstances necessitating a hearing of the cause out of the ordinary course must be shown, according to the former practice of the Court of Chancery under Chy. Ord. 271, (*Davidson* v. *McKillop*, 4 Gr. 146). In the present case I think the circumstances disclosed are sufficient to entitle the plaintiff to move. If the plaintiff has a just claim against the defendant he ought to have an opportunity of setting it off against the amount found due to him in the other suit. The affidavits, however, are conflicting, and it is therefore impossible for me to dispose of the matter on the present motion. The action must be entered for trial at the next sittings at Woodstock, and on the hearing of the other action on further directions the sum found due from the plaintiff will be ordered to be paid into Court to abide the result of this action. The costs of this motion must be costs in the cause.

FIRST DIVISION COURT OF THE COUNTY OF ELGIN.

(Reported for the LAW JOURNAL.)

MURRAY V. GILLETT, ET AL.

Promissory note—Endorsement—Guarantee—Joinder of causes of action—Ont. Jud. Act, sec. 77—Rule 92.

A promissory note was endorsed as follows:—"I guarantee the payment of the within note, and I waive protest and notice." Action by payee against maker and endorser or guarantor.

Held, that the guarantor could not be treated as an endorser; that although the causes of action, if any existed, might be joined, and the maker and guarantor sued in the same action, the Ont. Jud. Act did not interfere with the nature of the contract, and the plaintiff was as much bound to make out a substantial case since the Judicature Act came into force as he was before, and that it only affects the procedure and not the cause of action.

[Aylmer, Jan. 27, Hughes, Co. J.

Two actions by the same plaintiff, one against J. Gillett and B. E. Dancy, and the other against B. E. Dancy and A. Summers. The questions involved in these suits are identical. The plaintiff, as the holder of two promissory notes, sued the defendants as makers and guarantors in the same action; the notes were payable to the order of the plaintiff, and not endorsed by him. On the back of each note was endorsed the words, "I guarantee the payment of the within note, and I waive protest and notice." The first was signed by B. E. Dancy, and the second by A. Summers. Both suits were brought against the maker and guarantor jointly. The Judge thought at the trial that the suits had no right to be brought in that way. The endorsements on the notes expressed no consideration on their face for the guanantee and none was proved. The defendants put in written defences disputing their liability but did not appear at the trial.

Crawford, for the plaintiff, urged that on the authority of *Walker* v. *O'Reilly*, 7 U. C. L. J. 300, the guarantors had a right to be treated as endorsers, and that on the authority of *Howell* v. *West*, W. N., 1879, p. 90, the causes of action should have been joined in one suit, and that the 77th section of Ont. Jud. Act justified this plaintiff in joining the defendants and the causes of action in one suit in this Court.

HUGHES, C. J.—These cases are not like *Walker* v. *O'Reilly*, cited in the argument, for in that case the defendant Shibley, who had signed a guarantee on the back of the note, was also the payee. It was made payable to "John A. Shibley or bearer," who it was avowed endorsed the note to the plaintiff. *West* v. *Bown*, 3 U. C. R. 290, shows that a party who endorses his name on the back of a note, whether it be negotiable or not, if it has not been endorsed by the payee, cannot be sued as endorsers. In *Thew* v. *Adams*, referred to in *West* v. *Bown*, which is not reported, but was decided in Hilary Term, 3 Vict., by the Court of Q. B. of U. C., it was held that a payee of a negotiable note

suing the endorser who had put his name on the back of it, though the payee himself had not endorsed it, and suing him as endorser, could not recover.

In these cases the defendants who signed the guarantees on the back of the notes, cannot be made responsible as endorsers to the payer, because it would be inconsistent. The statute which permitted the holder of a promissory note to include all or any of the parties thereto to be sued and included in one action, was confined to makers and endorsers—as if they were joint contractors—but it did not apply to a person who is only collaterally responsible as upon a guarantee. A guarantor could not be sued upon a note whose name was not written thereon, as party to the instrument, and whilst I fully agree in the judgment of *Walker* v. *O'Reilly*, I think this case is distinguishable, and that if the parties who signed the guarantee are to be held at all, it must be upon the strength of the instruments they signed and as guarantors only.

The provisions of the Judicature Act (sec. 77) confer power on and require this Court to grant in any proceeding before it such relief, redress or remedy, or combination of remedies, either absolute or conditional, in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

By Rule 93 of the Judicature Act, the plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes, which is a repetition only, in this respect, of the R. S. O., cap. 50, sec. 134. By Order xiii., Rule 113, O. J. A., the plaintiff may unite in the same action, and in the same statement of claim several causes of action.

In *Howell* v. *West*, W. N., 1879, p. 90, an action was held to be rightly brought against two defendants on totally distinct causes of action, so that upon the authority of that case this plaintiff, under the remedies afforded by the Judicature Act, was justified in joining these defendants and the causes of action as he has done. But the Judicature Act does not make that a contract which had not validity as such before the Act came into force, it only extends and simplifies the procedure and remedy where a cause of action exists. The defendants in these cases have put in defences which oblige the plaintiff, whether they appear at the trial or not, to make out a valid claim against each of them, otherwise the Court cannot give judgment, or it can only give judgment against those who are made to appear as liable to such judgment.

There are various cases in the books which show that a guarantee such as that endorsed on these notes is not valid or binding upon the guarantor, because it does not express any consideration for such an undertaking; the consideration must either appear on the face of the instrument, or it must be proved. In the absence of both I must decline to give judgment against Benjamin E. Dancy in the suit first named, and against Alexander Summers in the second suit named. There will be judgment against James Gillett only in the first named suit, and against Benjamin E. Dancy only in the second suit.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

RICHARDS V. CULLERNE.

Imp. J. Act, 1873, s. 89, O. 42, r. 5—Ont. J. Act s. 77, O. 38, r. 5 (No. 343.)

The power of a County Court under the above section of the Act, in actions within its jurisdiction, to enforce obedience to its orders by committal, extends to interlocutory as well as to final orders.

[C. of A., July 27 - L. R. 7 Q. B. D. 623.

JESSEL, M. R.--The only point on which we ought to give an opinion in this case is whether the rule of *Martin* v. *Bannister*, 4 Q. B. D. 491, is to be confined to the enforcing of final judgments. Looking at the language of the J. Act, 1873, s. 89, I can see no reason for so confining it, the words "any proceeding" being applicable to any stage of an action. *Martin* v. *Bannister* decides that the language of s. 89 covers a breach of an injunction, and, in my opinion, it applies to every case where, if the action were in the High Court, a party could be committed for disobedience.

BRETT, L. J.- In *Martin* v. *Bannister* it was decided that the County Court had power to commit for breach of final order. Does this power extend to the breach of an order made in the course of an action? The words of s. 89 of the J. Act, 1873, appears to me clearly to import that the County Court has the same power as

the High Court in regard to every step in this action. * * *

COTTON, L. J. :—I am of opinion that the case is governed by *Martin* v. *Bannister*. * * * The decision in that case did not turn at all upon the fact that the order was a final one, but upon this, that "remedy" included not only the power to make orders, but the power to enforce them, and that reason applies just as much to interlocutory as to final orders.

[NOTE.—*Imp. J. Act, 1873, s. 89, and Ont. J. Act, s. 77 are, so far as this case is concerned, identical. Imp. O. 42, s. 5, and Ont. O. 343 are identical.*

GATHERCOLE V. SMITH.

Imp. J. Act, 1873, s. 16, subs. 8, O. 19, r. 3; O. 19, r. 8; O. 20.—Ont. J. Act, s. 16, subs. 8, O. 15, r. 3 (No. 127); O. 15, r. 9 (No. 133); O. 16—Pleading—Counter-claim—Set-off.

Held, where defendant pleads by way of set-off and counter-claim to a claim of the plaintiff of such a kind that no set-off is permissible—as for example, a claim for arrears of a pension—the defendant's claim fails altogether, and his set-off and counter-claim must be dismissed.

(C. of A., April 11—L. R. 7 Q. B. D. 626.

We purpose to extract those portions of the judgments which discuss the above point.

LUSH, L. J.—The defence is a set-off of an unsatisfied judgment to a larger amount than the sum claimed. Calling it a counter-claim does not make it different from what it is. It is a claim which might have been set off under statute, 2 Geo. II. c. 22. That Act relieved a party who owed another debt from the obligation to pay and seek his remedy by a cross-action, by enacting that where there are mutual debts one may be set off against the other. If the debt due to the defendant exceeded that due from him to the plaintiff, that Act gave him no remedy for the excess. He must have sued for that in a separate action. The Judicature Act alters this so far as to authorize the Court to give judgment for the excess. But that is all. The set-off is not an independent action. It is still a defence and nothing more. If the plaintiff before the Judicature Act chose to discontinue his action the defendant could not claim to have his set-off tried. It fell with the action to which it was and still is adjunct. According the M. R. decided in *Jamasour* v. *Krupp*, L. R. 15 Ch. D. 474, that a counter-claim could not be preceded with after the plaintiff had discontinued his action. The principle is, that if there is nothing against which the matter pleaded can be set up by way of relief, the set-off falls to the ground.

BAGGALLAY, L. J., said :—"I do not feel satisfied that a set-off and a counter-claim are the same. I do not think that the rules of Court intended that they should be so regarded in every instance. I think that in some instances a set-off may fail, whilst a counter-claim may succeed ; but what we have to consider is whether judgment can be given in favour of the defendant upon a counter-claim when it has been already decided that the same facts pleaded by way of set-off do not create a valid defence. Upon consideration, I think that in this case the defendant relies upon a counter-claim by way of set-off, and the alleged counter-claim is in fact nothing more than a set-off. Now it was held by this Court upon appeal from the Chancery Division (in another action by the same plaintiff for certain other arrears of the same pension) "that the judgment obtained against the plaintiff could not be pleaded by way of set-off and must be rejected. * * * I think we are bound by the judgment of this Court upon the appeal from the Chancery Division."

BRAMWELL, L. J., dissented upon the point of its not being permissible to give the defendant judgment upon its set-off or counter-claim. He said : "I have a difficulty in understanding the argument ; but I wish to speak of it with respect, because great stress has been laid upon it by Lush, L. J. The argument is, that the counter-claim of the defendant is in truth a set-off. It is, in effect, contended that a set-off supposes that there is something against which the defendant's claim can be set-off ; and that when there is nothing against which it can be set-off, the defendant's claim fails altogether. * * * As I understand this argument I cannot agree with it. I will refer to the words of the Jud. Act 1873, s. 24, sub.-sec. 7. [reads it : Ont. J. Act s. 16, subs. 8.] So far as the point before us is concerned, I think that the legislature has made no difference between a set off and a counter-claim. Then by O. 19, r. 3 [reads it : Ont. O. 15, r. 3]. To my mind that provision has the following meaning : a defendant may set up in the action any claim which he may have against the plaintiff, and obtain the aggregate judgment

upon it. If the character of the claims is such that one cannot set off against the other, i. e. if a balance cannot be struck between them, and if judgment cannot be given for the balance, nevertheless a final and appropriate judgment may be given upon each claim; so that in the present case, if the defendant had relied upon a promissory note by way of counter-claim, the plaintiff would have been entitled to judgment and execution for so much of the pension as is due to him, and the defendant would have been entitled to judgment upon the promissory note. Then by O. 19 r, 8, (reads it, Ont. O. 15, r. 9). Surely this rule must apply to a set-off as well as to a counter-claim, and it is a strong argument to show that a set-off and a counter-claim are the same. In O. 20 (Ont. O. 16) such language is used in the words of the rules as to make it manifest that the terms "set-off" and "counter claim" are used indifferently. It follows that if a balance cannot be struck between the conflicting claims, separate judgments may be given, and judgment must be pronounced in both the original and the cross claims.

NOTE.—*It will be observed, two of the three Judges regard a set-off and a counter-claim as the same thing. Imp. J. Act, 1873, s. 16, subs. 8, O. 19, r. 3, and O. 19, r. 8, are identical respectively with Ont. J. Act, s. 16, subs. 8, O. 15, r. 3, and O. 15, r. 9. The rules of Imp. O. 20, and Ont. O. 16 are almost, but not completely, identical.*]

DIGEST OF RECENT DECISIONS IN UNITED STATES COURTS.

BILLS AND NOTES—FICTITIOUS PAYEE.

1. Where a draft or bill of exchange is made payable to a real person, known at the time to exist and present to the mind of the drawer when he makes it, as the party to whose order it is to be paid, such draft or bill must bear the genuine indorsement of such payee, in order for a *bona fide* holder to recover thereon, although the bill is drawn without the knowledge or consent of the payee, through the false representations of the party obtaining it from the drawer by fraud.

2. Where a drawer of a bill of exchange is induced by the false representations of a correspondent seeking to defraud him, to make a bill payable to a fictitious person, not knowing the payee to be fictitious when he makes the bill, and intending that such bill shall be payable to a real person, and thereafter transmits such bill to his correspondent with instructions to obtain a note and mortgage therefor from the payee therein named, and then to deliver over to such payee the bill, and the correspondent negotitates the bill to an innocent holder for value, and before dishonour, it will be no defence against such *bona fide* holder for the drawer to set up that he did not know the payee to be fictitious, and as such bill runs to a fictitious payee, it is as if drawn payable to bearer. *Kohn* v. *Watkins*.—Central L. J., Jan. 27.

MASTER AND SERVANT—NEGLIGENCE.

1. Although machinery, or that part of it complained of as specially dangerous, is visible, yet if, by reason of the youth or inexperience of the servant, he is not aware of the danger to which he is exposed in operating it, or in approaching near to it, it is the duty of the master to apprise him of the danger, if known to the former.

2. A foreman, in charge of a separate department of the work, whose directions an employee is directed to obey by the foreman of the establishment, is not a fellow-servant of such employee. *Dowling* v. *The Girard B. Allen Co.*—Ib., Feb. 3.

ATTORNEY—SUSPENSION FROM PRACTICE.

An attorney, with knowledge of the facts, who advises and takes steps to assist in a violation of the bankrupt law of the United States, whereby, in violation of such law, one creditor secures a preference over other creditors, is subject to suspension as an attorney and counsellor of the law. *In re Naphtaly*, S. C. Cal.—Ib.

CONTRACT—COMPOUNDING CRIMINAL PROCEEDINGS.

A mortgage given by a mother for the purpose of stopping a prosecution against her son, who was indicted, is void. *Riddle* v. *Hall*, S. C. Pa. - Ib.

REPLEVIN—CUSTODIA LEGIS.

Goods seized under a writ against another party than the owner are not in *custodia legis*, and replevin will lie against the officer. *Davis* v. *Gambert*, S. C. Iowa.—Ib.

LIFE INSURANCE—FORFEITURE.

A life policy will be forfeited unless the premium is paid on the day stipulated, and the failure to pay by reason of illness and insanity will not avoid the forfeiture. *Klein* v. *New York Life Ins. Co.*—The Reporter, Dec. 14.

BANK ACCOUNT OF INSURANCE AGENT—LIEN OF BANK.

When a bank account is opened in the name of a depositor, as general agent, and it is known to the bank that he is the agent of an insurance company; that conducting its agency is his chief business; that the account was opened to facilitate that business, and used as a means of

accumulating the premiums on policies collected by him for it, and of making payment to it by checks,—the bank is chargeable with notice of the equitable rights of the insurance company, although the depositor deposited other moneys in the same account and drew checks upon it for his private use. And the insurance company may enforce by bill in equity its beneficial ownership therein, against the bank, claiming a lien upon the balance thereof for a debt due to it from the depositor, contracted for his individual use. *Central National Bank* v. *Connecticut Mutual Life Ins. Co.*—Ib., Dec. 7.

PARTNERSHIP—REAL ESTATE.

Real estate purchased with partnership funds, for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the copartners.

For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated, and, though he cannot convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate, and the right to compel a conveyance of the title from the heir or devisee in a court of equity. *Shank* v. *Klein.*—Ib.

MASTER & SERVANT—EXTRAORDINARY RISKS.

A servant assumes all risks naturally incident to his employment. If he finds that in the course of his duty he becomes exposed to extraordinary danger, but makes no complaint or objection, he assumes that risk also. *Green, etc., R. W. Co.* v. *Bresmer.*—Legal Intelligencer, Dec. 2, 1881.

VENDOR AND VENDEE—AGENT.

An innocent vendor cannot be sued in *tort* for the fraud of his agent in effecting a sale. In such a case the vendee may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in *assumpsit* for it, or he may sue the agent for the deceit. *Kennedy* v. *McKay.*—Albany L. J., Jan 28.

ACCRETION.

If solid land be washed away and afterwards restored by alluvial deposit, such restored land belongs to the original owner of the land, as also any increase thereof. *Morris* v. *Brooke.*—Ib.

CRIMINAL LAW—ATTORNEY AND CLIENT.

A client placed in the hands of his attorney in a suit, as a paper in such suit, a lease. In a criminal prosecution against the client for forgery of the lease, *held*, that the attorney could not be compelled to produce the lease. *Pennsylvania* v. *Moyer.*—Ib.

CORRESPONDENCE.

Professional Charges.

To the Editor of the LAW JOURNAL.

DEAR SIR,—Some years ago a scale of professional charges in conveyancing and other matters out of the Court, or for which no tariff is fixed by rules of Court, was, I have been informed, drawn up, settled, and adopted by the legal profession or a majority of them. If it is accessible to you, could you do me—as well as a number of other enquirers—the favour of publishing it in the columns of the LAW JOURNAL. If it were made generally known it would, I think, be of great assistance to practitioners and what is very important, tend to keep up uniformity of charges among them—a principle acted upon recently by the medical profession.

Yours truly, A SUBSCRIBER.

Toronto, February, 1882.

[We believe there was some such tariff prepared and more or less acted upon. It seems, however, to have been lost sight of, and we cannot at present lay our hands upon it. As it was not binding on any one, and as conveyancing is open to the public, it would not perhaps be of much use to unearth it, even could its place of sepulture be found. No matter what tariff might be settled, charges would be made "to suit customers."—EDS. L. J.]

OSGOODE HALL.

OPENING OF THE NEW CONVOCATION HALL.

The full reports of the proceedings at Osgoode Hall, on the evening of the 7th instant, which have appeared in the City papers render it unnecessary to do more than to record the address presented to the Treasurer, Hon. Edward Blake, Q.C., by Dr. Smith, the Chairman of the Building Committee, and a condensed report of Mr. Blake's reply, which we take from one of the reports referred to. The following is the address of Dr. Smith:—

"Before the evening's programme is proceeded with, the duty has devolved upon me, as Chairman of the Building Committee, to hand over to you, Mr. Treasurer, as representing the Law Society of Upper Canada, this very handsome and commodious building in its complete condition.

The want of a suitable examination hall is one that has been long felt by the Benchers, though, I may say, it has been mainly due to you, sir, and to your wisdom

and energy, that this want has been supplied, and that we are privileged to be present here to-night at the formal opening of this building.

The Law Society of to-day stands in a very different position to what it did when I entered it, as a student, forty-four years ago. A very small room would then suffice for the examination of the students, and although as time has rolled on, increased facilities have periodically been provided, yet it has of late so outgrown itself that it has become an imperative necessity to secure larger and more suitable accommodation in order that the candidates might have a fairer examination than they were having in the old building, and I maintain, sir, that the Benchers, with ample means at their disposal, would have been highly censurably had they failed to carry out these improvements so necessary towards the promotion and advancement of higher legal education.

In every direction around us we see noble seats of learning springing up, costly structures, whereon all that art and high artistic skill can achieve have been lavishly expended; and should the Law Society of Upper Canada, which can count among it members men who have adorned and still adorn some of the highest positions in public life, prove laggards in the race, or fail to obtain a fitting abode for its members whilst those of other schools of learning are so sumptuously provided for?

Again, if the young men of Ontario who are looking to the law for their profession are accustomed to be associated and brought into everyday contact with such surroundings as these, will they not necessarily tend to exert a beneficial influence over them and to raise their thoughts and aspirations to nobler aims and higher purposes?

What do we witness if weturn to the Motherland in this respect? Fabulous sums expended to raise pile upon pile of the grandest and noblest design, and all done to give dignity and stability to their seats of law —as the palatial buildings recently erected in the heart of the great city of London will abundantly testify to-day.

Until very recently, Mr. Treasurer, the very name of the distinguished individual, after whom these buildings have been called, was but little known, and to many it was a matter of doubt if such a being ever existed; but through the liberality which has characterized your administration, as Treasurer, the name of Chief Justice Osgoode has been rescued from oblivion, and his likeness (for which we are indebted to the courtesy of the Rev. Dr. Scadding) has been painted by Berthon, and now looks down from our walls upon our deliberations every time we assemble in convocation, so that without adverting to the numerous other schemes for the promotion of legal education which have been carried into effect under your administration, the Law Society under your auspices is daily making fresh departures in the field of progress and advancement.

But I feel that I am digressing, and as I have been warned to "cut it short" I shall be very brief, for I am aware that there is much to be done to-night; but I feel, in justice to our architect, Mr. Storm, I should say something in approval of the masterly manner in which he has carried out this work entrusted to him, and I think, Mr. Treasurer, if you and those who have kindly favoured us with their presence here to-night will only judge for yourselves, you can come to no other conclusion than that for breadth of design and for beauty of detail his whole work has been most harmonious and complete. Of his "ancient skill" you have only to survey the graceful proportions of the library, main hall, and corridors of the central building to pronounce him to be a thorough and accomplished architect.

Neither should I omit to say a good word for the contractors, all of whom (and I say it "without prejudice" to our claims for delays) have acquitted themselves to our satisfaction in carrying out their several contracts under the supervision of the architect, and of Mr. John Smith, the Society's careful clerk of works.

I shall no longer take up your time, Mr. Treasurer, but conclude by formally handing over to you, on behalf of the committee which I have the honour to represent, the hall of "Osgoode Hall."

The Treasurer replied in his usual eloquent manner, and we regret not to have a verbatim report of his speech His remarks were in substance as follows:—

On behalf of the Law Society he accepted at the hands of the chairman of the Building Committee the new structure in its present complete state, but at the same time he could not individually claim that large amount of merit which had been assigned him as regards the undertaking. He referred to the feeling of unanamity which prevailed regarding the success of the builders' handiwork, and said that the profession had some reason to congratulate themselves upon this addition to their estate. The last occasion, the hon. gentleman said, on which this society had entertained anyone was 22 years ago, when they had the honour of receiving the heir to the English throne. Looking at the society to-day, what was its position as compared with that of former times? Then there were 600 or 700 barristers upon the rolls, now there were 1,700 or 1,800, and that single statement would show how totally inadequate the accomodation which then existed was for the present day. The profession was in some respects a close one and necessarily so In the seven provinces which constituted the Dominion of Canada the legal profession would be found pretty well represented. In the provinces of British Columbia, Manitoba, Ontario, Nova Scotia and Prince Edward Island the Lieutenant-Governor in each case was a lawyer. Allpersons know that there is one individual in evey country constitutionally governed who is even more powerful than a Lieutenant-Governor, namely his First Minister and adviser. The First Minister of Ontario is a lawyer, the First Minister of British Columbia is a lawyer, and so on with the provinces of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. The First Minister of Canada is also a lawyer, and he believed that if the cold realms of the Opposition were invaded the profession would be found to be fairly represented. With reference to the saying that the profession had been made a close one, if such were the case it was for the public good. It is important that those who desire to resort to law as a profession should be submitted to a test, and upon the Law Society of this Province has devolved the duty of applying these tests in the shape of examinations, and these were what tended to make the profession a restricted one. In order that this duty might be discharged conscientiously, it was found necessary from time to time to promote a better system of examination. The Society had found some difficulty in their way owing to the increasing numbers of candidates. The learned gentleman here made an amusing reference to the fact that considerable cribbing and copying had been in vogue among students in by-gone years, owing to the fact that the seats had been placed

too near each other in the examination hall. The Society had now arranged, by having built this new hall, to leave a distance of five feet between each desk, so that the evil would be remedied. The new hall had already been utilized for examination, examinations having been conducted there during the present term. At these two gentlemen had acquitted themselves in a very creditable manner, one having taken the gold and the other a silver medal. It would be his pleasant duty to present these gentlemen with these marks of merit if they would come forward.

Mr. E. T. English and Mr. Adam Johnston, the two gentlemen referred to, then came up to the platform and received each his medal, Mr. Blake speaking a few words of praise for their past efforts, and hope for their future success in the profession which they had begun in so brilliant a manner. A round of applause greeted the recipients of the medals, and with a few additional remarks the Treasurer concluded his speech.

A short speech by Mr. Isaac Campbell, president of the Osgoode Legal and Literary Society, concluded this part of the evening's entertainment.

It is supposed that over two thousand persons were present at the Converzasione, and all seemed to enjoy themselves. The arrangements were simply admirable and reflect the greatest credit upon those entrusted with them.

FLOTSAM AND JETSAM.

The following gentlemen, in the Province of Quebec, have been Gazetted as Queen's Counsel: Messieurs, P. C. Duranceau, Edmund Barnard, James Oliva, F. W. Andrews, D. J. Montambault, B. A. Globensky, J. J. Curran, M. M. Tait, C. C. de'Lorimier, L. O. Taillon, J. E. Larue, J T. Wotherspoon, Louis Tellier, Ernest Cimon and Donald MacMaster.

THE HON. JAMES O'BRIEN, second justice of the Queen's Bench in Ireland, died on the 29th ult. at his residence, St. Stephen's Green, at the age of seventy-five years, having been born on February 27, 1806. His loss will be sincerely regretted by the legal profession and the public. He was a sound and an able constitutional lawyer, whose judgments were held in the highest respect, while his uniform courtesy and consideration to every practitioner and suitor in his court were gratefully appreciated. He was a mild and merciful judge in criminal cases, and prisoners often found their best defence in his keen and conscientious examination of every point in their favour, and every possible flaw in the case for the Crown. He was called to the bar in 1830, was made Queen's Counsel in 1841, a serjeant-at-law in 1848, and was elevated to the bench January 25, 1858.—*Irish Law Times.*

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Solicitor acting for Mortgagor and Mortgagee.—*London L. J.*, Jan. 14.

Government Loans to occupying tenants for agricultural improvements.—*Irish Law Times*, Jan. 14.

Liability for Dogs.—*Ib.*

Slander of a person in his calling.—*Ib.*

Malicious Prosecution—Probable cause.—*Central L. J., et seq.*

Promissory Note—Does stipulation for attorney's fee render it non-negotiable.—*Ib.*, Feb. 3.

Retention of judgment debts by Town Agent for debts due from Country Solicitor.—*Irish L. T.*, Jan. 21.

Larceny of dead game and the doctrine of possession.—*Ib.*

Implied contracts as to chattels.—*London L. J.*, Jan. 7.

Presence of officer in jury-room.—*Albany L. J.*, Jan. 28.

Is it negligent to ride on a street car platform.—*Ib.*, Feb. 4.

The responsibility of Guiteau,—*American Law Review*, Feb.

Liability of subscribers as affected by amendments to charters of incorporation.—*Ib.*

Issues involving the fact of insanity—The burden of proof.—*Ib.*

Can damages for causing death be recovered independent of any statute.—*Ib.*

Right of a mortgagee to a personal order against purchaser of mortgaged property.—*Canadian L. T.*, Feb.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

SCHOLARSHIP.

Leith's Blackstone–Greenwood on Conveyancing.

1. Give shortly the first four sections of the Statute of Frauds.

2. Distinguish between a bar of dower by jointure and by ante-nuptial settlement.

3. Explain why it is that powers cannot be engrafted upon a deed operating by way of Bargain and Sale?

4. What is a way of necessity? Give an example.

5. What was formerly the necessity for attornment upon a sale of real estate? Why is it not now necessary?

6. A tenant-in-tail purchases the reversion and dies intestate. Who takes the property?

7. (1.) What is a sufficient *interruption* in order to stay the course of the Statute of Limitations in the case of easements? (2.) B. has enjoned an easement for 19 years and 6 months. During the next 13 months he does not enjoy it. Is he entitled to enforce his right to it?

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DIARY FOR MARCH.

1. Wed.... Court of Appeal sittings begin. St. David's Day.
5. Sun.... *2nd Sunday in Lent.* Osler, J., appointed.
6. Mon.... Name of York changed to Toronto, 1835.
7. Tue.... County Court for York, sittings begin. Court of Appeal sittings begin.
12. Sun.... *3rd Sunday in Lent.*
21. Mon.... Czar assassinated, 1881.

TORONTO, MARCH 1, 1882.

WE regret that circumstances have forced us to wait until our next issue before noting several current English practice cases now reported, we hope, however, to present our readers with a large instalment then, and so make amends for the small one in the present number.

A short time since an old subscriber in a country village, being underbid by a host of wayside form-fillers, thought he would economise by giving up the LAW JOURNAL. A few days ago we received a post card from him in these words:—"Please send me the journal again, I cannot do without it."

IT appears now that Sir George Bramwell instead of taking a territorial title, has been made a Peer of the Realm under letters patent, granting him the dignity of a Baron of the United Kingdom, under the name and title of Baron Bramwell, of Hever, in the county of Kent. He thus retains a name, under which, though a different title, he is best known to fame. We trust he may long live to enjoy it.

THE constitutionality of Provincial Legislation is beginning to be tested, and will doubtless so continue. In British Columbia, just before the mail left, an interlocutory judgment was being delivered in the *Thrasher-Vieux Violard* case, and it seemed probable that the Thrasher people would get a rehearing before all the Judges; but we shall soon know whether much of the legislation there directed against the Supreme Court is unconstitutional, and whether the right of making rules of procedure is not to be returned to the judges.

WE see advertised in the February number of one of our most valued contemporaries, the *American Law Register*, a work which may easily escape the notice of the library committee, but the purchase of which would undoubtedly be an acquisition to the library. It is a digest of the *American Law Register*, from the commencement, published by D. B. Canfield and Co., Philadelphia. Anyone familiar with this most useful periodical will know what a mine of information on all kinds of legal questions the Digest referred to is likely to prove, and we hope soon to see it added to our shelves. While on the subject of the library, we cannot refrain from calling attention to the many gaping voids existing in our collections of American reports.

A vacancy having occured in the reportership of the Court of Appeal by reason of Mr. Tupper's change of residence to Winnipeg, Mr. Grant becomes reporter to the Court of Appeal, and Mr. Percy Galt, reporter to the Court of Chancery. The change of Mr. Grant to the Court of Appeal will be an advantage. It did not seem agreeable to the fitness of things that the Clerk of one Court should be reporter to another. The series of Chancery reports known by the name of Grant will be personally historical of

an old and valued officer, but the plan of naming reports after their compiler is an inconvenience which it will be well to get rid of. There were a number of applicants for the vacancy, and though some of them would have been a credit to the staff, there will be but one opinion that a most efficient, intelligent and courteous reporter has been secured in Mr. Galt.

IT appears from an article in the *Central Law Journal*, for January 20th, that it is the practice across the border for the Court to limit the time of argument with consent of counsel on both sides. The writer says that this is done in many civil cases and in a few minor trials for crimes, and he cites decisions to show that the Court is always sustained in this. In many States the practice is somewhat regulated by Court rules. Thus, Circuit Court rule 63, of Michigan, provides that no more than two hours shall be allowed to either side for the summing up of a cause, unless the Court shall otherwise order, and the same is substantially true in New York. The general summary of the matter is that although a wide discretion is left to the Court in reference to the time of argument, it may be so abused as to make it necessary to reverse the case on appeal or to allow a new trial, and it often becomes material to the defense, whether sufficient time has been allowed in summing up to permit justice to be done.

WE are glad to register a modest vote in favour of the admirable scheme, advocated by our contemporaries the *Central Law Journal* and the *Albany Law Journal*, but which we understand originated with the *Daily Law Register*, for the establishment of a uniform system of digesting and indexing. There can be no question that if a well-considered method of arrangement were uniformly adopted it would be a great assistance in that search for authorities and precedents which at present is often a most distracting and harassing task. Moreover, if the plan fixed upon should be based on sound scientific principles of division, the familiarity with it which would result from constant use would be a decided mental gain. The idea suggested of a convention of reporters, authors and legal editors, is a very attractive one, and if the delegates prepared themselves before meeting by giving thought and study to the subject, the basis might undoubtedly be laid for a practical realisation of the project. The idea is new to us, but we would suggest that the best method of proceeding would possibly be to invite the various Law Societies having direction of the issuing of official Law Reports to send delegates empowered to represent them. If the legal official bodies agreed on a uniform method of arrangement, the free lances of the profession would soon follow suit.

CONVEYANCERS.

WE find among the statutes of Manitoba for 1880-1881, c. 25, an Act respecting conveyancers which shows that the powers that be in the sister Province do not find it so impossible to do justice in this matter to the profession and the public as our own rulers appear to do. Section 1 empowers the Lieutenant-Governor in Council, from time to time, to appoint conveyancers in and for the said Province. Section 3 provides that "Persons other than barristers and attorneys, duly admitted as such in this Province, desirous of being appointed as conveyancers, shall be subject to examination in regard to their qualification for the said office of conveyancer by any one of the Judges of the Court of Queen's Bench, and no person shall be appointed a conveyancer without a certificate from one of the Judges of the said Court that he has examined the applicant and finds him qualified for the office." Section 5 provides that conveyancers so appointed shall be liable for negligence just as attorneys

and solicitors are. And finally, section 6. clinches the matter by providing that no person or persons, excepting duly admitted barristers or attorneys, or persons appointed as hereinbefore provided, shall, for reward, hire or recompense, draw, pass or issue any conveyance, deed, indenture, contract, agreement, charter party or other mercantile documents, and any person violating this section shall be guilty of an offence under this Act, and be liable, on conviction thereo before any Justice of the Peace, to a fine not exceeding twenty dollars for each offence."

A somewhat similar enactment is in force at Victoria, in Australia. A correspondent there gives us a copy of it:—"Every person who shall for or in expectation of any fee, gain or reward directly or indirectly draw or prepare any conveyance or other deed or instrument in writing relating to any real estate or any proceedings in law or equity (other than and except barristers or attorneys and solicitors of the Supreme Court, or certificated conveyancers as hereinafter mentioned; and other than and except persons solely employed to engross any deed instrument or other proceeding not drawn or prepared by themselves and for their own account respectively; and other than and except public officers drawing or preparing official instruments applicable to their respective offices and in the course of their duty), shall be deemed guilty of a contempt of the Supreme Court and shall and may be punished accordingly for every such offence, upon the application of any person complaining thereof; or shall for every such offence forfeit and pay the sum of twenty pounds, to be sued for and recovered in a summary way before any two or more justices of the peace, &c." Our correspondent says that the provision is only partially successful as it is extremely difficult to trace cases to absolute proof, and a few of the lowest class of attorney are in the habit of lending their names to land agents and other middlemen, and so enable them to defy the provisions of the statute. The practice is kept alive by the public who very much encourage the preparation of transfers without the intervention of an attorney, as the illegitimate is cheaper than the legitimate practice and the great risk that is run is not apparent to uneducated man. The method of conveying land in use in Australia by means of a simple transfer consisting of a few printed lines which is registered, and immediately operates as a conveyance, of course encourages the practice of unlicensed conveyancing. However, as we have heretofore pointed out, these invaders are occasionally "brought up with a round turn," by the Australian Courts. There is in Manitoba and in Australia some semblance at least of fair dealing and justice to those who spend their time and money in acquiring a profession.

THE SUPREME COURT.

The third number of Vol. 5 of the reports of this Court have recently come to hand, containing the judgment in five cases. None of them can be said to be of very general interest to the Ontario Bar; some facts nevertheless, and conclusions worth noticing are deducible from the pages before us.

The latest judgments reported therein are those of *Gallagher* v. *Taylor* and *Jonas* v. *Gilbert*, delivered on February 11th., 1881. Two others were delivered in February and March, 1880, and another on January 12th, 1879. In two cases judgment was not delivered for upwards of six months, and in three others for nearly four months after the argument. In two of the cases it appears that the senior puisne judge took part in the judgment, but it is merely noted that he read a written judgment stating his reasons for his conclusion.

In the second number of this same volume published some time ago the state of things is very much the same, as regards delay in giving judgment after argument and in the publica-

tion of the Reports, though it is observable that two of the judgments reported therein, viz: *Erb* v. *G. W. R. Co.* and *Fitzgerald* v. *G. T. R. Co.*, were delivered in June, 1881, some months after the latest of those which appear in No. 3.

As to the delay on giving judgment, there is no doubt it is to some extent attributable to the fact that the Judges do not all reside in Ottawa, and the opportunity for consultation is thereby reduced. This consultation is of course a matter of vital moment. A free exchange of views and a cordial and full discussion of conflicting opinions, and a consequent elimination of legal truth should be one great advantage derivable from a large Bench. If this is wanting, confusion becomes worse confounded, and instead of one well considered judgment embodying the best opinion of the majority of the judges, after examining the points in question from all sides, we have a disjointed patch work of individual opinions that carries comparatively little weight with the profession, and is disastrous in its effect upon the administration of justice in the eyes of the public. There have been causes assigned for this state of things quite apart from the minor one already referred to, known to those within the inner circle; should these continue the country will not unnaturally clamour for a reconstitution of the *personel* of the court, or for its abolition. Not only should the very best talent that the country can produce be had at any price, but there should be that harmonious working and mutual personal respect amongst the members of the Bench, without which it will be in vain to expect beneficial results for the public. The Court has so far been a failure, partly owing to the inherent difficulties of our confederation, partly to the fact that the best talent has not always for some reason or other been taken advantage of, and partly owing to the difficulties and infirmities of a personal nature which we do not care to enlarge upon.

The delay in issuing the reports is said to be sometimes owing to the difficulty of obtaining the MSS. from some of the judges. If this be the case the reporter should see that the judgments are taken down by a stenographer at the time of their delivery. The judges are under no obligation to deliver their MSS. to the reporter, nor could a judge under such circumstances complain that what he stated in Court was not his judgment, or needed alteration. This course would soon remedy the supposed evil and the blame would then rest on the right shoulders. The present condition of affairs must be pronounced unsatisfactory, and it is high time that the Government, who must know all about the evils complained of, did something to make this most important Court more what it was originally intended to be than it is now.

RECENT DECISIONS.

Proceeding with the December number of L. R. 18 Chy. Div., we still have the cases from p. 524 to p. 710 to review.

WILL.—EXECUTORY DEVISE.

The first case is *In re Lechmere* v. *Lloyd*, in which the M. R. had to construe a devise to E. for life, and from and after her death to such of her children living at her death "as either before *or after* her decease" should, being males, attain 21, or, being females, attain that age or marry, in fee simple as tenants in common. He held that those of E.'s children who were adults took vested interests liable to open to let in the other children, who were minors, on their fulfilling the conditions of the will. He takes an important distinction, as appears at p. 528 of the judgment, where he says: "If the devise be to A. for life, and after her death simply to a class of children who shall attain 21 or marry, I agree that those members of the class who have not attained 21 or married at the death of the tenant for life, though they may do so afterwards, cannot take, according to the rule in

Festing v. *Allen*, 12 M. & W. 279; but here we have two distinct classes of the objects of the devise, the one being children living at the death of the tenant for life, and attaining 21 or marrying *before* the death, and the other being children living at the death and attaining 21 or marrying after the death. * * But to enable the second class to participate it is necessary to read the gift to them as an executory devise. The rule is that you construe every limitation, if you possibly can, as a remainder, rather than as an executory devise. It is a harsh rule; why should I extend it? Why should a gift that cannot possibly take effect as a remainder, not take effect as an executory devise? I see no good reason why it should not." And he refused to follow *Brackenbury* v. *Gibbons*, L. R. 2 Ch. D., 417, which he said was, so far as he was aware, the only other case in which the words here used occur.

MARRIAGE SETTLEMENT—COVENANT BY INFANT WIFE.

The next case, *Smith* v. *Lucas*, p. 531, is like *Dawes* v. *Tredwell*, which we noted *supra*, p. 68, one upon the effects of covenants in a marriage settlement. *Dawes* v. *Treadwell* is not referred to in *Smith* v. *Lucas*, but the distinction would appear to be, that in the latter case it was agreed and declared between and by the parties thereto, and the husband covenanted that he *and his future wife*, and all other necessary parties, would bring into settlement after-acquired property of the wife. In such case, says Jessell, M. R., p. 543: "It is quite settled by authority that if the wife is of age a proviso or agreement of that kind has the effect of a contract entered into by her; it is a covenant on the part of the wife as on the part of the husband." He went on in this case to hold that if the wife is a minor, and the covenant is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during coverture for her separate use, *without a restraint on anticipation*, until she avoids or disaffirms the covenant as to such property; but that if she elects to conform the covenant, she thereby binds only that separate property to which she is entitled at the date of the confirmation. As to this last point, he says, p. 545, after referring to the recent case of *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D, 454: "I think that the power of disposal given to a married woman as regards her separate property is simply a power to dispose of existing property, and not a power by contract, or *quasi* contract—for she cannot strictly contract—to dispose of other property while she is a married woman.'

HOTEL—RECEIVER.

In *Truman* v. *Redgrave*, p. 547, the M. R. appointed a receiver and manager of an hotel on the interlocutory application of the mortgagees, who had been prevented by the mortgagor from taking possession under the mortgage, and also granted an injunction restraining the mortgagor from interfering with the management. He refused to listen to the objection that if he appointed a receiver and manager of the hotel, the person who had the license might be liable to be summoned for some dereliction of duty on the part of the receiver.

STATUTE OF LIMITATIONS.

In the next case, *Bray* v. *Tofield*, p. 551, the question came up, whether a claim against a testator's estate on a promissory note would be kept alive by reason of an administration action having been commenced by another creditor within the period allowed by the statute, although the decree therein was not obtained until the said period had expired. The M. R. held it would not be kept alive; and he warns creditors not in future to rely on the case of *Sterndale* v. *Hankinson*, 1 Sim. 393, in which Sir John Leach, V. C., held that every creditor has, after the filing of a bill in equity, an inchoate interest in a suit instituted by one on behalf of himself and the other creditors, to the extent of preventing the former being held barred in equity through his having relied on the latter obtaining his decree within the six years. As to

this case, the M.R. observes (i.) that although the Statute of Limitations did not affect Courts of Equity, because it only applied to what were commonly called common law actions, now bills of equity have been abolished, and wherever it is an action to recover a debt upon a contract, the statute is binding upon the High Court in every case in which it applies ; (ii.) it is no longer necessary, nor is it the practice, as far as personal estate is concerned, to bring an action by one creditor on behalf of others ; (iii.) a decree can be obtained now in a very few days, and therefore the reason for the decision in *Sterndale* v. *Hankinson*, no longer applies, and *cessante ratione legis, cessat ipsa lex.*

COMPANY—JURISDICTION.

Of *Cercle Restaurant Co.* v. *Lavery*, p. 555, it seems only necessary to say that it affirms the jurisdiction of the Court to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to wind up the company, where the debt is *bona fide* disputed, and the company is solvent.

EQUITABLE PRIORITIES—INNOCENT PURCHASERS.

The next case, *Keate* v. *Phillips*, p. 561, is "a most singular case," (per Bacon, V. C., p. 575), the Court having to decide, under very complicated circumstances, whose right was to prevail as between several innocent parties who had equally suffered through fraud. Without going into the facts minutely, it seems possible to state the points which came up for decision with sufficient clearness. They were as follows: (i.) A fraudulent mortgagor obtained an advance upon the security of a fictitious lease. His solicitor, fully conscious of the fraud, stood by while the mortgage was being completed, and received the mortgage money. The question was whether, from this conduct of the solicitor, it must be inferred that he *represented* that the fictitious lease to the mortgagor, and then the underlease from the mortgagor to the mortgagee, was a valid, genuine, legitimate transaction. As to this Bacon, V. C., merely observes: "Those are the slenderest representations, so far as the evidence goes, that can be conceived,"—and proceeds to deal with the next point : (ii.) The said solicitor at the time of this transaction had an interest in the property in question, viz.: an equity of redemption, which he had mortgaged to one L. And the question now arose whether, assuming his above-mentioned conduct did amount to a representation, as maintained, he did, by virtue and by force of this representation, charge the property in which he had this equity of redemption; and whether, as a consequence, when he acquired, as at a subsequent date he did acquire, the absolute beneficial interest in paying off L.'s mortgage, the defrauded mortgagee had a right to have the representation carried out to its full extent, and to the extent of making a charge upon the property supposed to be comprised in the fictitious lease, so as to give the defrauded mortgagee a prior equitable charge as against subsequent purchasers for value without notice. As to this Bacon, V. C., said, p. 577, that he had never heard of, and did not believe there was any case in which the principle in question had been carried to such an extent ; that, assuming the solicitor had been guilty of misconduct for which he could be punished, and a wrong which could be redressed against him personally, he was, nevertheless, at a loss to see how it touched the estate. This, he said, brought it close to the common law doctrine of estoppel :—"But the doctrine of estoppel is purely legal. There is no case in which a trustee, having made a fraudulent representation by which he was bound, or even a fraudulent conveyance, when he got his legal estate confirmed, but still remaining a trustee, was so estopped as to deprive the persons beneficially entitled to the estate which was theirs, and of which he was the trustee and trustee only. The doctrine of estoppel, therefore, in my opinion, has no place whatever in the case before me. * * * Where is the case to be found that says that a man who has committed a misde-

meanour and contracted an equitable liability is not at liberty afterwards, with a *bona fide* purchaser, to deal with the thing which in his hands might be charged, but which when once out of his hands it is impossible that a Court of Equity can ever reach so as to make the subject itself—the substance,—liable for the nefarious transactions into which this man entered. * * * It cannot be said that because a man commits a misdemeanour with relation to a certain estate, that the estate is thereby for ever bound." (iii.) The third point decided in the case was that M., an innocent purchaser for value (a mortgagee), with whom the *genuine* title deeds were deposited, was, though subsequent in date, entitled in priority over two prior purchasers for value who had been defrauded by means of the fictitious leases. As to this Bacon, V. C., said, p. 579, —M. lent his money, and had and retains possession of the deeds. * * * Then, if it be a true principle of the Court of Equity that you cannot take from a purchaser for valuable consideration without notice anything which he has acquired, how can I say that the mortgage made to M. is not a mortgage first in point of rank on this estate?" And he also observes, p. 575,—"The rule *Qui prior est tempore potior est jure* is a very convenient rule when it can be applied, but when a case is accompanied by circumstances so complicated as the one before me, it is impossible solely to rely on that well-established rule of law."

COMPANY—CONTRIBUTORIES.

The next case *In re London, Bombay, and Mediterranean Bank*, p. 581, appears to be one of first impression: (per Hall, V. C., p. 584). A company with full knowledge allotted 140 shares to a *feme covert*, at the request of her husband, who paid the deposit and subsequent calls. The husband afterwards sold and transferred these 140 shares, executing the transfer for his wife, or in her name. All these transactions took place without the wife's knowledge. Subsequently the company was ordered to be wound up, and the wife was placed on the list of contributories as a past holder of these shares, as to which it was held, on summons taken out on her behalf, that she was liable only to the extent of such separate estate as she was entitled to or had power to dispose of during the coverture. The liquidator of the company, having now learnt that the wife had been ignorant of the transactions with regard to the shares, applied to have the list of contributories rectified by inserting therein the names of the executors of the husband (now deceased) instead of that of the wife, so as to make his estate liable in respect of the 140 shares. But Hall, V.C., refused the application, saying that there was no case that he was aware of in which the register had been rectified where the name had been put upon the register deliberately by the company without any fraud or concealment whatever; and that the non-communication to the wife of the fact that the shares had been put into her name, could not have the effect of varying the actual effect and operation of the transaction.

Ex parte Apyleyard, p. 587, fitly comes under the same heading as the last case. It seems only necessary to say in regard to it that a director of a company, which was being wound up, having been put on the list of contributories in respect of 500 shares, sought to prove in the winding up against the company in respect of an alleged breach of contract by the company, that he should have these 500 shares as fully paid up, and, the breach of the contract by the company having been established, he was held entitled to prove in the liquidation for damages for calls made or which might be made on the shares.

WILL.—LAPSE.

In *in re Spiller*, p. 614, a testator, having given the residue of her estate equally among A. B. and C., and such of the children of D. as were living at the date of her will, and D. having died before the date of the will, leaving no children, it was held there was no intestacy, because there was no gift, and that the whole residue was divisible among A. B. and C.

CONVEYANCING—RIGHT OF WAY.

The decision in *Barkshire* v. *Grubb*, p. 616, can be best and most shortly given in the words of Fry, J., at p. 622: "When there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purpose of the other, and that other is granted with the general words, 'together with all ways now used or enjoyed herewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

ESTATE PER AUTRE VIE.

In Re Barber, p. 624, may also be disposed of shortly by saying that the principle on which the decision proceeds is that the analogy of a fee simple estate is to be applied, so far as it can be applied, both as to the capacity and incapacity of alienation of an estate *per autre vie.*

WILLS—"FINAL DIVISION" OF ESTATE.

In *in re Wilkins*, p. 634, Fry, J., held that where a testator gave certain shares in the residue of his estate to the children of legatees in case the legatees should die before the "final division" of his estate, he must be held to have meant by "final division" the period of one year from the testator's death. At p. 637 he says:—"On the supposition that the testator was influenced by the motives which ordinarily actuate mankind, I think that I am bound to conclude that he had this period in his mind, because no inconvenience would on that interpretation result from the terms of his will."

COMPANY—CONTRIBUTORY.

Of the next case, *in re Albion Life Assurance Society*, p. 639, it seems only necessary to note that on the construction of the articles of association of the Assurance Society in question, it was held that a policy-holder who had assigned his policy, ceased to be liable as a contributory, although no other person had been made liable to contribute in respect of his policy in his stead.

A few cases still remain to be noticed in this December number of the Chancery Division Law Reports, which we hope to deal with in our next number together with those in the small instalments of January and February Law Reports, and in the *Law Journal* reports for the same month.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

ONTARIO.

MCDOUGALL V. CAMPBELL.

Mortgage - Agreement to postpone—Non-registration—Priority.

In 1861 W. M., the owner of real estate, created a mortgage thereon in favour of J. T. for $4,000. In 1863 he made a subsequent mortgage in favour of J. M., the appellant, to secure $20,000, which was duly registered on the day of its execution. In 1866 W. M. mortgaged to C., the respondent, the lands mortgaged to J. M. for the sum of $4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied towards the payment thereof, and J. M. executed an agreement that the proposed mortgage to respondent should have priority over his. In 1875 J. M. assigned his mortgage to the Quebec Bank to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which had never been registered, and the existence of which J. M. had not mentioned to the bank. C. filed his bill against the executors of W. M., and against J. M. and the bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants except J. M., who was ordered to pay off the plaintiff's mortgage, principal and interest. J. M. thereupon appealed to the Supreme Court.

Held, (Strong, J., dissenting) that as J. M. could not justify the breach of his agreement with C., J. M. was bound both at law and equity to indemnify C. for any loss he sustained by reason of such breach. Decree of the Court of Appeal affirmed.

Maclennan, Q.C., and *Armour*, for appellant.

J. A. Boyd, Q.C., for respondent.

QUEBEC.

DUPREY, ET AL., v. DUCONDIE.

Sale en bloc—Deficiency—Warranty, effect of.

By a deed executed October 22, 1866, for the purpose of making good a deficiency of fifty square miles of limits which respondents had previously sold to appellants, together with a saw-mill, the right of using a road to mill, four acres of land, and all right and title obtained from the Crown to 256 square miles of limits, for a sum *en bloc* of $20,000; the respondents ceded and transferred, "*with warranty* against all troubles generally whatsoever" to the appellants, two other limits containing 50 square miles; in the description of the limits given in the deed the following words are to be found, "Not to interfere with limits granted or to be renewed in virtue of regulations." The limits were, in 1867, found in fact to interfere with anterior grants.

Held, that the respondents having guaranteed the appellants against *all troubles whatsoever* the latter were entitled, pursuant to Art. 1518 C. C., P. Q., to recover the value of the limits from which they had been evicted proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover, pursuant to Art. 1515, C. C., for all improvements, but as the evidence as to proportionate value and damages was not satisfactory it was ordered that the record should be sent back to the Court of first instance, and that upon a report to be made by experts to that Court on the value of the said limits proportionally upon the whole price and on the increased value of the same at the time of eviction, the case be proceeded with as to law and justice may appertain.

HENRY and GWYNNE, JJ., dissenting.

Bethune, Q.C., and *Trenholme*, for appellants.

Pagnuelo, Q.C., and *Conville*, for respondents.

EXCHEQUER COURT.

Taschereau, J.] [Montreal.

THE QUEEN v. MCNALLY. and WM. MCNALLY, CLAIMANT.

Information in rem—Onus probandi.

The Queen, on the information of the Attorney General for the Dominion of Canada, prayed that a certain quantity of drain pipes, etc., seized as dutiable goods upon which duty had not been paid, remain forfeited. Wm. McNally intervened and claimed the goods.

At the trial, the counsel for the plaintiff called upon the claimant to open the case, the counsel for the claimant contended that the Crown was bound to make out a *prima facie* case.

Held, that under the Customs Act, that the claimant was bound to prove he had paid the duties, and therefore the burden of proof was on him.

Fournier, J.]

MCPHERSON V. THE QUEEN.

Appeal under 42 Vict., ch. 8—Award- Damages resulting from obstructing access to property —Personal damages not proper subjects of compensation—31 Vict., c. 12, sec. 34 - Direct or consequent damage to property.

The official arbitrators to whom the Minister of Public Works referred the suppliants' claim for damages sustained by them in consequence of and during the construction of the extension of the Intercolonial Railway at Halifax, awarded the suppliant $500. On an appeal to the Exchequer Court under 42 Vict., c. 8, the amount awarded was increased to $3,633.00. The facts are briefly these:—

Suppliant was a ship-builder and owner of a ship yard in Halifax, to which he had access on the north side from Young Street, and on the south side by the harbour of Halifax. The railway was extended along 150 feet of these premises, and Young Street was raised from 2½ to 5 feet; facing the property on the south-east the level of the railway is 19 feet above the suppliant's land. During the progress of the works a drain was built which extended 120 feet on suppliant's land, and some damage was caused to his property by the breaking up of the embankment. The suppliant proved that the construction of the railway through Young Street

obstructed that access to his ship yard, and that in consequence his property had become useless as a ship yard, and had depreciated in value of over 33 per cent.; he also proved that in consequence of the frequent passing of the locomotives there was extra danger of fire, and higher rates of insurance were asked; also that he had suffered personal damage in his business to the extent of $1,200 per annum.

Held, that the building of the drain on suppliant's land, and obstructing of access by way of Young Street to his ship yard had caused "a direct damage to suppliant's property" within the meaning of these words in 31 Vict., c. 12. sec. 34, and for which he was entitled to claim compensation, and which, in this case, he had proved to amount to $3,633.

Held also, that the damages claimed for loss of business and extra risk of insurance were personal damages, and too remote and not such damages for which claimant was entitled to claim compensation under the statute.

(*Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 216, and *Henry Ricket* v. *The Directors, etc., Metropolitan Ry. Co.*, L. R. 2 H. L. 175, followed.)

Gormully, for appellant.

Lash, Q.C., for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO. DEC. 5, 1881.

WILSON v. GILMOUR.

Ejectment—Life lease—Exception.

R G., owner in fee, leased to his daughters three acres with right of way to a well, orchard and dwelling, after his wife's death, for their lives or that of the survivor. Afterwards he conveyed to his son, W. G., the land which included the three acres, subject to a mortgage, the son having notice of the agreement between R. G. and his sisters. Then W. G. conveyed to plaintiff, "Subject to right of R. G.'s wife and daughters to occupy the house and three acres during the life of them or the survivor, and the right to and from the well," and subject to the encumbrance. The plaintiff executed this deed, and he brought ejectment against the daughters for the three acres.

Held, that the demise of the three acres operated as the creation of an immediate term, with right of occupation by R. G.'s wife during life, and that "Subject to, &c.," in the deed to plaintiff, amounted to an exception, or as a regrant of the three acres to her vendor.

Bethune, Q.C., for plaintiff.

Maclennan, Q.C., contra.

DEC. 1, 1881.

DEVLIN v. QUEEN INS. CO.

Fire policy—No statutory conditions—Wilful negligence.

The statutory conditions were omitted from a fire policy, stated, however, on its face to be subject to the Co.'s conditions indorsed thereon, one of which was that the insured was to use every effort to save and protect the property on pain of forfeiture of policy. The finding at the trial was that plaintiff wilfully neglected to save the property, and it was *held* to be a policy with statutory conditions alone.

J. K. Kerr, Q.C., for plaintiff.

Osler, Q.C., for defendant.

NORTH OF SCOTLAND MORTGAGE CO. v. UDELL.

Mortgage—Equity of redemption—Merger—Burden of proof.

Defendant, a mortgagor, covenanted to pay principal and interest; he then granted his equity to plaintiff for a mere nominal sum. He gave plaintiff his note for portion of the interest. In an action on the covenant in the mortgage for payment, the jury were directed that if the grant of the equity and note were accepted by plaintiff in full of the covenant, to render a verdict for defendant; but if accepted on condition it should not so operate, to find for plaintiff; that there being no evidence as to how this was, it must be taken to have been accepted in full of the plaintiff's debt, the charge being merged. The verdict having been for defendant, the Court *held* there was no misdirection, the burden of proof that there was no merger being upon plaintiff, and they refused to interfere.

Bethune, Q.C., for plaintiff.

Moore, contra.

NOBLE V. CORPORATION OF TORONTO.

Overflow from sewers—Liability of corporations—Negligence—New trial.

Plaintiff was tenant of premises on Queen and Bathurst streets, in Toronto. Plaintiff's drain, which the defendants made at plaintiff's lessor's charge, connected with a main sewer on Queen street, which extended to the west. In this, at Portland street, was a wall, for the purpose, as alleged, of keeping the flow separated and sending it easterly and westerly. There was a drain on Bathurst street, south of Queen, and afterwards, some three or four years before suit, a drain was made on Bathurst street to the north of Queen. A creek was constructed into this, the water being at times some six feet in depth, and several by-streets were drained into the same. Plaintiff's premises were flooded several times within the time before suit above stated, the ground of action being the flooding caused by a continuous rain of from eight to nine hours. It was charged that the sewers had been, in the first place, badly made, and that there was negligence in not repairing, but the mere proof offered was the flooding and the facts before stated, when a verdict was given in his favour, but the Court granted a new trial, ARMOUR, J., *dissentiente.*

Bethune, Q.C., for plaintiff.

McWilliams, contra.

CHANCERY DIVISION.

Boyd, C.] [Feb. 1.

CLEAVER V. NORTH OF SCOTLAND MORTGAGE CO.

Vendor and Purchaser—Possession.

In an action for specific performance it was declared that the plaintiff was entitled to an abatement in the price of the land for non-delivery of possession to her, and because, though the crops had been advertised for sale, it was found that one-half thereof belonged to others to whom the defandants' mortgagors had, with the assent of the defendants, assigned them. It was referred to the Master to take an account of what allowance should be made the plaintiff, and the Master allowed for deterioration in value through neglect and non-cultivation, and charged the defendants with interest on purchase money received up to the time of delivery of possession.

Held, that there was no reason to interfere with his ruling, but that the contract might have been more nearly carried out by allowing interest on unpaid purchase money and charging the defendants with occupation rent for the time they had retained possession after it should have been delivered.

By the conditions of sale it was stipulated that the balance of the purchase money was to be paid one month after sale, and conveyance to be then made, but nothing was said as to delivery of possession.

Held, (1) that the expiration of the month being the time for the completion of the contract the purchaser ought *prima facie* to have been put in possession by the defendants at that time.

(2) That the purchaser was not bound to take possession while any part of the premises was occupied by third parties; and that in a case like the present the *onus* lies on the vendor of showing that the purchaser could safely take possession.

Marsh, for plaintiff.

Moss, Q.C., for defendant.

Proudfoot, J.] [Feb. 8.

DAVIDSON V. OLIVER.

Construction of will — Administration—Accounts.

The testator died in February, 1869, having by his will, amongst other bequests, given certain legacies to be paid in nine and thirteen years, and also devised two lots of land to his sons D. and R. respectively, subject to certain charges; the devisees to be put in possession of their respective lots when the youngest child attained 21, at which time D. and R. were to obtain one-half of the stock and implements then on said lots respectively; the other half thereof to be divided amongst other legatees. Before the youngest child attained majority an administration suit was instituted and in proceeding in the Master's office at Hamilton, that officer directed an account of the stock and implements on the several lots at the time of the reference, and being the proceeds of the old stock left thereon by the testator, and also those subsequently procured from the produce of the said lots, together with an account of the stock

and implements on hand and which were there at the death of the testator.

From this direction of the Master the defendants appealed on the grounds that they would be required to bring in an account only of the stock and implements left by the testator and remaining on the lands, and that if any further account was to be furnished it should be only of stock and implements purchased with the proceeds of the sale or obtained by the exchange of the stock and implements left by the testator. The Court, (PROUDFOOT, J.) however, being of opinion that the Master's direction was proper, dismissed the appeal with costs.

H. Cassels, for plaintiff.

Moss, Q.C., for defendant.

Proudfoot J.] [Feb. 13.

DICKSON v. CARNIGIE.

Riparian proprietor—Rights to reasonable uses of water.

A mill owner has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands for the use of his mill, but his right is a qualified one and subject to the lawful and reasonable uses of the water by a mill owner above him on the same stream, and this although the user above him may be at times for any extraordinary purpose.

Richie and *English*, for the plaintiff.

W. G. Cassels, for the defendant.

Ferguson, J.] [Feb. 13.

SNARR v. GRANITE CURLING & SKATING CO.

Artificial lateral support—Material thereof—Damages by removal of support—Future damages—Costs.

The plaintiff was entitled to the lateral support by the defendants' land in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged:—

Held, that in substituting artificial support, for the material support of soil which had been removed, the defendants might construct it of any material, provided that it was a sufficient support for the time being, and that they continued to maintain the plaintiff's land in its proper position.

Held also, that in estimating the plaintiff's damages past injuries only could be taken into account and no sum should be allowed for damages to arise in future.

The damages were assessed at $40, but judgment was given for the restoration of the plaintiff's land.

Held, that the plaintiff was entitled to her full costs of suit.

James Beaty, Q. C. and *J. C. Hamilton*, for plaintiff.

W. G. Cassels, and *Brough*, for defendants.

Proudfoot, J.] [Feb. 13

VANSICKLE v. VANSICKLE.

Will—Construction of—After acquired property.

The testator owned eighty acres of land and sold a part thereof; subsequently and on the 30th March, 1875, he made his will whereby he devised to his son N. the said eighty acres ("excepting so much thereof as I may have sold and conveyed"). Thereafter and shortly before his death he again acquired the part which he had sold.

Held, that though the will spoke from his death the after acquired property did not pass; for the testator had specified the subject matter of his devise, within which the property in question was not included.

J. Robertson, Q.C., for the plaintiff.

Smythe, for the defendant.

Proudfoot, J.] [Feb. 13.

BRALEY v. ELLIS.

Chattel Mortgage—Prior advances—Pressure.

Where there is a promise to execute a chattel mortgage, upon the faith of which money is advanced, or where there is a pre-existing duty to give such a mortgage, which is in consequence of pressure subsequently executed, the same is not void within the meaning of the act respecting fraudulent preferences.

Held also, that the doctrine of pressure which obtained before the insolvency laws, now occupies the same position since their repeal.

Gibbon, for the plaintiff.

W. G. Cassels, for the defendant.

Boyd, C.] [Feb. 15.

BARKER v. LEESON.

Chattel mortgage—Sale without renewal—Creditor—Interpleader—Setting up new title.

A chattel mortgage which has expired by effluxion of time, under R. S. O. cap. 119, sec. 10, and has not been renewed or refiled, ceases to be valid as against all creditors of the mortgage then existing; and a sale on default in good faith made by the mortgagee, though good as between the parties to the mortgage, cannot establish the mortgage as against creditors, but passes to the purchaser a title subject to the rights of any creditor who take steps to follow the goods.

A creditor to be within the meaning of the above section need not be a judgment creditor.

Remarks upon the policy of the chattel mortgage act.

In an interpleaders issue the claimant relied upon his purchase and bill of sale from the chattel mortgagee, and the issue was found against him.

Held, that he could not afterwards set up another title in the same issue, but that this was matter for a substantive application to the Court.

W. S. Gordon for execution creditor.

Patullo for claimant.

———— J.] [Feb. 22.

IN RE MACNAB.

Vendor and Purchaser's Act—Will—Construction—Power of Sale with executor's consent—Practice—Parties.

A testator devised to his wife during the term of her natural life a parcel of land, with power of sale at any time during her life, subject to consent of his executors. Testator appointed three executors, one of whom was deceased. A contract for sale having been entered into, it was objected by the purchaser that the consent of the surviving executors would not confer a valid title.

Held, 1. that in the state of the authorities, the title was not one that could be forced on a purchaser.

2. That under such general power the land could be sold in parcels.

3. That on an application to the Court under Vendor and Purchasers' Act, the only parties who need be represented, are those who would be parties to a suit for specific performance, and mortgagees, who had been made parties to the application, were dismissed with costs.

H. Cassels for petitioner.

J. Pearson for purchaser.

Moss, Q.C., and *Crickmore* for mortgagees.

CHAMBERS.

Mr. Dalton, Q.C.; Boyd, C.] [Jan. 18, 30.

LAPLANTE v. SCAMEN.

Vendor and purchaser—Title—Vesting order—Depreciation.

Held, that a purchaser at a sale of lands under a decree of the Court upon the usual conditions, is not bound to accept a vesting order.

Held also, that when the plaintiff, the vendor, was first mortgagee, and the purchaser, a defendant, was second mortgagee of the interest of A. S., who was out of the jusisdiction and refused to execute a conveyance, the purchaser could not be compelled to take a vesting order or a conveyance under the power of sale contained in the plaintiff's mortgage.

Held also, that until a good title is shown the purchaser is not bound to accept possession even though offered to him by the vendor, and that the purchaser was entitled to a reference to the Master to ascertain the amount of the depreciation, if any, caused by the property being left vacant and neglected pending the investigation of the title, although the vendor had offered to give possession to the purchaser pending the investigation of the title.

Beck, for plaintiff, moving.

Patterson, for the purchaser.

Mr. Dalton, Q.C.] [Feb. 1.

RE CLARKE.

Solicitor and Client—Taxation—Retainer.

In this case the order for the taxation of the solicitor's bill contained a clause ordering payment of the amount taxed within 21 days from the taxation. This was a motion to set aside the order.

MR. DALTON, struck out the order for payment, holding that the practice under the J. A. in these matters was governed by Rule 443, and similiar to the common law practice before the passing of the J. A. He directed the order for taxation to go in the terms of the Rule to ascertain simply the amount of the bill, without going into the question of a retainer.

S. R. Clarke, the solicitor in person.
J. A. Worrell, contra.

Wilson, C. J.] [Feb. 17.

IN RE MCCLIVE ET AL. SOLICITORS.

Attorney and Solicitor—Costs—Interest on costs.

A solicitor may entitle himself to interest upon his bill of costs by demanding it in writing.

The taxing officer has no power to allow interest unless the matter has been specially referred to him by the order for taxation.

J. H. Macdonald, for the solicitors.
Aylesworth, contra.

Dalton, Q.C.- Proudfoot, J.] [Feb. 22.

NORVAL v. CANADA SOUTHERN RAILWAY.
CUNNINGHAM v. THE SAME.

Costs- Certificate of judgment of Court of Appeal —Practice.

Two decrees of the Court of Chancery were affirmed with costs by the Court of Appeal. Orders were made in Chancery Chambers (18th February, 1880) making the certificate of the judgments in appeal orders of the Court of Chancery.

The defendant then appealed to the Supreme Court, which allowed him a new trial without costs, permitting him to set up a defence then raised for the first time, but was silent as to the costs incurred in the courts below.

The plaintiff issued executions under the orders made in Chambers.

Mr. DALTON set aside the executions.

On appeal, PROUDFOOT, J., *held* that the orders in Chambers were regular, and until set aside might properly be acted upon, and should have due effect given them until reversed.

Appeal allowed with costs.

H. Cassels, for the appeal.
Cattanach, contra.

Cameron, J.] [Feb. 24

IN RE WILTSEY v. WARD.

Division Court—Appeal—Prohibition.

Plaintiff brought an action for $140 in a Division Court and recovered judgment. Defendant applied for a new trial which was refused, and from this decision he appealed to the Court of Appeal. After the bond in appeal had been perfected, and while the appeal was pending, defendant applied for a prohibition to the Division Court on the ground of jurisdiction.

Held, that such an application could not be entertained until the matter was out of the Court of Appeal.

Aylesworth for the plaintiff.
McDonald for defendant.

Mr. Dalton, Q.C.] [Feb. 25.

LIGHTBOUND v. HILL.

Pleading—Amendment—Judgment, opening up.

Plaintiff signed judgment against defendant in default of a plea and issued execution. At the time the suit was brought defendant was insolvent, and plaintiff alleged no fraud in his declaration.

Held, that the plaintiff should not be allowed, after the lapse of two years, to open up the judgment and amend the declaration by alleging fraud.

Holman, for plaintiff.
Aylesworth, for defendant.

REPORTS.

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

GRANT V. GRANT.

Administration—Partition—Time for granting.

An order for the administration of an estate of a deceased person was refused on the ground that twelve months had not elapsed from the death of the deceased, and no special circumstances were shown, although the administrator was one of the applicants,

An order for partition of the realty was also refused when the application was made within six months of the death of the person whose estate was sought to be partitioned. The Rule laid down by the Partition Act, R. S. O. c. 101, s. 6, held applicable.

[February 15.—Boyd, C.

T. S. Plumb moved on notice under Orders 638 and 640 for administration and partition or sale of certain property in the County of Haldimand.

Isaac Campbell, for the infants, consented to the order going.

H. Symons, for an adult defendant, objected (1) that administration could not be obtained within a year from the death of the intestate; (2) that partition could not be obtained till after six months from the date of the decease; (3) that the application should have been made to the local Master, the lands being all in one county, and no special cause being shown. He referred to *Re Slater*, 3 Chy. Ch. R. 1; *Vivian* v. *Westbrook*, 19 Gr. 461, R. S. O. c. 101. s. 6; *Barry* v. *Barry*, 19 Gr. 458.

Judgment reserved.

THE CHANCELLOR—An administration, and partition, or sale, are sought by the administrator and some of the next of kin and heirs-at-law of an intestate. No special reason is given for applying within six months of the death. It is clearly too soon to apply for administration under *Slater* v. *Slater*, 3 Chy. Ch. R. 1, and I think the analogy of the Partition Act, (R. S. O. c. 101, s. 6,) limiting six months from the death may very well apply to this case, see *Bennett* v. *Bennett*, 8 Gr. 446. The policy of the statute should apply to all partition matters regarding the lands of a person deceased whether testate or intestate. I refuse the application with costs.

(See *Rowsell* v. *Morris*, L.R. 17 Eq. 20—Rep.)

CHAMBERLAIN V. ARMSTRONG.

Mortgage suit—Rules 45, 78—Judgment by default in action commenced in local office.

When an action is commenced in a local office, judgment for default of appearance, or pleading, must be entered in the local office.

An action for foreclosure, sale or redemption of mortgaged property is not within Rule 45, and no order allowing service is necessary, and on default of appearance judgment may be entered on præcipe, according to the former practice in Chancery.

[February 15—Boyd, C.

This was an action for foreclosure of a mortgage. The writ had issued from the office of the Deputy Registrar at London.

Two of the defendants had been served with the writ of summons out of the jurisdiction, and an order had been made by the Master in Chambers simply allowing service. The defendants had not appeared. On applying to the Registrar to enter judgment he had refused to do so in the absence of an order as to the manner of proceeding in the action, and as to the mode in which plaintiff was to prove his claim as provided by Rule 45 *(e.)* And because the writ having been issued from a local office a judgment for default of appearance or defence must be entered in the local office.

H. Cassels, for plaintiff, now applied *ex parte* for a direction to the Registrar to enter the judgment, or for an order authorizing the entry of judgment on præcipe. He contended that the clause in Rule 45 *(e)* commencing "and if the defendant does not appear, etc.," only applied to cases where the action is one not coming within the clauses *a*, *b* and *c*, and that no order to proceed was necessary.

THE CHANCELLOR—Without pronouncing any opinion as to the proper construction of Rule 45, I think this being a mortgage case it is governed by Rule 78, and as under the former practice the plaintiff would have been entitled to judgment on præcipe without an order, he is entitled to it now.

On conferring with PROUDFOOT, J., however, we concur in thinking that it is better to confine actions commenced in outer offices to the local offices. It will be known there if appearance is

entered or not, and whether the judgment may be properly signed as on default. (See *Dougall* v. *Wilburn*, 1 Chy. Ch. R. 155,)

LEE V. CREDIT VALLEY RAILWAY CO.

Creditors suit—Injunction restraining action by creditor dissolved.

In a creditor's suit against a Railway Company a Receiver had been appointed and a reference as to creditor's claim directed, and an action brought by a creditor against the company for unliquidated damages had been restrained by injunction, and leave given to the plaintiff in the action to prove his claim in the Master's office; but, before doing so, the Receiver passed his accounts and was discharged by consent of the parties to the suit. On a subsequeut application by the creditor who had been so restrained, the injunction was dissolved, but without costs.

[February 14, 15.—Boyd,C.

This was an action brought by creditors, on behalf of themselves and all other creditors, against the defendant Railway Company, and on the 19th May, 1880, decree had been made by consent appointing a Receiver of the railway, and referring the cause to the Master to take accounts of creditors' claims.

On the 8th February, 1881, on the application of the plaintiffs, an order had been made by BLAKE, V.C., restraining the plaintiff in an action of *Wrigley* v. *The Credit Valley Railway Co.* then pending in the Queen's Bench for the recovery of damages for wrongful dismissal from the Company's employment, from further prosecuting that action, and giving him leave to prove his claim in this suit before the Master.

On the 4th March, 1881, a statute was passed by the Ontario Legislature (44 Vict., c. 61,) enabling the company to consolidate its bond debt by the issue of new preferential bonds, and making provisions for the payment of 50c. in the dollar on the claims of all creditors other than bondholders, who should accept the benefit of the Act.

In pursuance of the arrangements authorized by the Act, the claim of the plaintiffs, Lee & Co. against the Company, was satisfied, and by consent of the parties to this suit an order was made on the 5th June, 1881, discharging the Receiver.

Wrigley had refused to proceed to prove his claim before the Master.

Meek, for Wrigley, now moved to dissolve the injunction, and for leave to proceed with the action. The passing of the Act, 44 Vict., c. 61, and the discharge of the receiver had so altered the condition of affairs that the plaintiff ought no longer to be restrained from carrying on his action.

Blackstock, for the defendant company—The discharge of the Receiver is no ground for this application. Wrigley has still power to establish his claim, if any, before the Master, and the Company are prepared to give him every facility for so doing. The discharge of the Receiver does not preclude the plaintiff getting the benefit of the decree.

Cur. adv. vult.

THE CHANCELLOR—The order of BLAKE, V.C., was evidently made upon the footing that as all creditors were to come in and prove before the Master, it was more convenient to have Wrigley's claim disposed of by him; but on the passing of the Receiver's accounts and his discharge on the 5th June, the condition of affairs has been so changed as no longer to justify the continuance of this injunction. As the case was before, the plaintiff could not get execution as against the Receiver, but now the company is in possession of its own affairs and assets, and no reason exists for compelling Wrigley to come into the Master's office.

Order granted discharging injunction without costs.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

MARSDEN V. LANCASHIRE AND YORKSHIRE RAILWAY CO.

Imp. J. Act 1873, s. 18, 19. Ont. J. Act, s. 37.—Jurisdiction of Divisional Court.

Where at the trial of an action the Judge gave judgment for the plaintiff without costs, and the plaintiff afterwards applied to the High Court to have this varied; *held*: the High Court had no jurisdiction to entertain an appeal from a final judgment, and the application of the plaintiffs ought to have been made to the Court of Appeal in the first instance.

[March 18, C. of A.—L. R. 7 Q. B. D. 641.

The above head-note sufficiently explains the point in question.

LORD SELBORNE, L. C., said in the course of his judgment:—

Myers v. *Defries*, L. R. 4 Ex. D. 176 shows that an alternative power is vested in the Divisional Court, and that it has a jurisdiction to disallow the costs. If the Judge at the trial has made no order as to the costs, the Divisional Court has power to disallow the costs; but if he has made an order under the power vested in him, then the Divisional Court has no jurisdiction. If the order of the Judge is wrong in point of law, an application to rectiy it must be made to the Court of Appeal. The present application is to alter a final judgment, and not to the alternative jurisdiction of the Divisional Court.

[NOTE.—*The sections of the Imperial and Ontario Acts are not identical. It may be added that Lord Selborne in this case expresses an opinion that the decision in Collins* v. *Welsh, L.R. 5. C.P.D. 27, as to the power of the Judge at the trial over costs, is correct.*]

ROBERTS v. DEATH.

Imp. O. 45, rr. 6, 7. Ont. O. 41, rr. 9, 10, (Nos. 374, 375.)—Garnishee proceedings—Absence of suggestion by garnishee.

Where in garnishee proceedings the money is trust money, or there is reasonable suspicion that it is trust money, the *cestui que trust* has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act.

[C. of A. Nov. 18.—51 L. J. N. S. 14.

The above head-note is taken *verbatim* from the judgment of Brett, L. J., and is his own summary of the point of law and practice involved.

The following passage from his judgment makes the matter clearer:—

BRETT, L. J.—The order sought to be obtained under the garnishee proceedings was an order that a man who had obtained judgment really as trustee should pay over money so obtained to a creditor who had really no right to it. The money is the money of the *cestui que trust;* but it is said that as the garnishee made no suggestion to that effect, the *cestui qui trust* cannot make it, and that such an injustice is to be perpetrated by order of the Court. I cannot believe that such is the law. The rules are copied from sections 29 and 30 of the Com. Law Proc. Act 1860. (R. S. O. c. 50, s. 313), passed at a time when the common law courts could not give a remedy, although the courts of equity could. This order would, under the garnishee proceedings, be made absolute by a Master acting for a Judge sitting in a Court of equity. He would, therefore, have an equitable jurisdiction, and a Court of equity would never have made an order that money belonging to a *cestui que trust* should be paid away to a person not entitled to it. The Court will not be a party to such an injustice, although the suggestion could be made by the *cestui que trust* under rules 6 and 7. It seems to me that the Court would listen to a party coming forward either upon the issue of a garnishee order or upon a summons subsequently taken out in time, and would order the money to be paid over to the claimant if the fact was clear that it was trust money, and would decline to make the garnishee order absolute if the facts as to whether the money was trust money or not were in dispnte.

COTTON, L. J.—The money here is trust money, and there is obviously an equity, as in the case where goods in the hands of a trustee are not allowed by the Court to be taken in execution. * * * I am not satisfied it (the case) is not within the words of rule 7, which clearly seem to give the Court or Judge power to cite any other person, although the garnishee has made no suggestion. I do not, however, rely on that. * * * Under the circumstances, and independently of these rules, this money ought to have been paid into Court to abide the event of the question whether it is trust money or not.

LINDLEY, L. J.—There would have been no difficulty under the old practice, which was to file a bill and to claim an injunction; but now that injunctions have gone, there is some difficulty in seeing what is to be done. * * * The Court ought, in my opinion, to make an order under rule 7 that the money be paid into Court to abide the event of the enquiry whether it is trust money or not.

[NOTE.—*Imp. O. 45, rr. 6, 7 and Ont. O. 41, rr. 9, 10 are identical.*

CLARBROUGH v. TOOTHILL.

Imp. J. Act, 1873, ss. 3, 16—Ont. J. Act, ss. 3, 9; Rule 2.

[June 23. M. R.—50 L. J., 743.

Where an Act passed before the Judicature Act, and referring in terms to common law actions only, empowered a Judge by rule or order

to command the attendance of witnesses, and production of documents, at arbitrations holden under that Act. JESSEL, M. R., *held*, it was clear that such an order might now be made in the Chancery Division.

[NOTE.—*The Imp. and Ont. sections appear mut. mut., to be virtually identical.*]

DIGEST OF RECENT DECISIONS IN UNITED STATES COURTS.

NAVIGABLE RIVER—RIPARIAN PROPRIETOR.

Courts will take judicial notice of the navigability of large rivers. *Wood* v. *Fowler.*—(S. C. Kansas) Central L. J., Feb. 10.

A riparian owner owns only to the bank and not to the centre of a navigable stream. Ib.

A riparian owner along a navigable stream does not own the ice which is formed on the stream adjacent to his land; and without first taking possession of and securing it, may not maintain an injunction to restrain a stranger from cutting and removing it. Ib.

CRUELTY TO ANIMALS.

Where the defendant killed, by a blow with a stick, a trespassing pig, for the purpose of protecting his wheat and corn, such killing is not the infliction of "needless" pain, within the meaning of the statute, for the prevention to cruelty to animals, although the act was unlawful; and such facts will not support a conviction under the act. *Grise* v. *State.* (S. C. Ark.) Ib.

MURDER—EVIDENCE.

Where the deceased, who was shot by assassins, in his dying declaration stated that the defendant and his confederates were distinctly recognized by him at the time of the shooting, which was corroborated by another witness' testimony of a conversation with the defendant, which tended to show his guilty knowledge and apprehension of arrest for the killing, and the defense was an *alibi* shown by those charged as being confederates and actors in the homicide, and their relatives, it was *held* that the evidence did not justify the court in granting a new trial on a conviction and sentence of the defendant to the penitentiary for eighteen years. *Norris* v. *People.*—(S. C. Ill.) Ib.

TRADE MARK—TRADE NAME OF A FIRM.

A trade name of a firm is property, and no other persons, without said firm's consent, or not having the same name, can use it in trade to the disadvantage or injury of said firm. Such trade-name may be assigned to a sucessor firm, which thereby obtains the same rights in said name as its predecessor had. *Howard* v. *Park.* (S. C. N. Y.)—Ib.

WILL—ESTATE UPON CONDITION.

A testator devised and bequeathed all the property of which he should die seized to his wife, "the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain should go to my surviving children, share and share alike." *Held*, that, under this will, the widow took a life-estate, subject to be divested upon her ceasing to be a widow, with power to convey the life estate only.—*Giles* v. *Little*, S. C. U. S., Central L. J., Feb. 24.

CONTRACT—AUCTION SALE.

Although, in a case where auction sales are required by-law, it is illegal to make a private agreement of sale, and then go through the form of an auction sale to perfect such agreement, yet it seems that such a sale can be set aside only at the instance of some one interested in having the property bring its full value, and not at the instance of the purchaser; nor can such a purchaser set up such a defence to an action for the purchase money. *Porter* v. *Graves*, S.C.U.S., October Term, 1881.—*Ib.*

BOOK REVIEWS.

DRINKS, DRINKERS AND DRINKING; or the Law and History of Intoxicating Liquors. By R. Vashon Rogers, Jr., Barrister-at-Law. Albany: Weed, Parsons & Co., 1881.

Whatever Mr. Rogers writes is worth reading, that may be accepted as a fact of which the profession takes "judicial notice". He has established a reputation as an author in a line peculiar to himself, but his books are as satisfactory to the lawyer as to the general readers. The work that first brought him into notice, a graceful roadway of narrative built on a solid stonework of authorities, achieved a great success, and his essays on cognate subjects are always received and read with pleasure.

The first and second chapters of the book before us give an account of various intoxicants, and the rules and laws of divers nations relative to intemperance, both very interesting sketches, showing much research. In no other place we fancy could there be found anything like the information here collected, and it is put in a most readable shape. The next two chapters are devoted to definitions; then come dessertations on contracts, deeds, wills, marriage, rights, wrongs

crimes, civil remedies and statute law, as connected with drunkards and intemperance. The subject is not in itself a pleasant one and a perusal of the many incidents necessarily introduced, leads one to think that after all there must have been some truth in the old fable, that after leaving the Ark, Noah planted a vine, and killed a sheep, a lion, an ape and a sow, and having mingled their blood together poured it all on the plant, which then absorbed into itself the natures of these different animals; so that ever after the use of the fruit of the vine has given to the drinker in succession, the stupidity of the sheep, the boldness and ferocity of the lion, the nonsensical noisiness of the ape and the filthy brutishness of the sow; whilst the description of a drunkard's death, extracted from Browne's Medical Jurisprudence of Insanity, horribly true in its woeful details, would seem sufficient to turn even a "moderate" into a "teetotaler."

The latter part of the volume will be found most useful to the lawyer. The subjects are well arranged and the authorities copious and carefuly selected.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

ANATOMY.

A system of Human Anatomy, general and special, by Erasmus Wilson, F. R. S., 10th edition, revised and enlarged: edited by George Buchanan, A.M., M.D., and H. E. Clarke. Philadelphia, 1880.

CONTRACTS.

The principles of the Law of Contract being a treatise on the general principles concerning the validity of agreements in the Law of England, 3rd edition, revised and partly re-written, by Fred. Pollock. London, 1881.

CONVICTIONS.

Paley's Law and Practice of summary conviction under the Summary Jurisdiction Acts, 1848 and 1879, including proceedings preliminary and subsequent to convictions, and the responsibility of convicting magistrates and their officers; with forms, 6th edition, by Walter H. Macnamara. London, 1879.

CORPORATION.

A manual of the Law applicable to Corporations generally; including also general rules of law peculiar to Banks, Railroads, Religious Societies, Municipal Bodies and Voluntary Associations, as determined by the courts of England and the United States. By Charles T. Boone, L.L.B. San Francisco, 1882.

MUNICIPAL CORPORATIONS.

Commentaries on the Law of Municipal Corporations, by John F. Dillon, L.L.D. 3rd edition. Revised and enlarged: 2 vols. Boston, 1881.

PARTNERSHIP.

Commentaries on the Law of Partnership as a branch of commercial and maritime Jurisprudence with occasional illustrations from civil and foreign law; by Joseph Story, L.L.D. 2nd edition, by William Fisher Wharton. Boston, 1881.

PLEADING.

Bullen and Leake's Precedents of Pleadings, with notes and rules, relating to Pleading. 4th edition. revised and adapted to the present practice in the Queen's Bench Division of the High Court of Justice; by Thomas J. Bullen, Esq. and Cyril Dodd, Esq.; in two parts. Part I. Stevens and Haynes. London, 1882.

PRACTICE.

Archibald's Country Solicitor's Practice. a handbook of the practice in the Queen's Bench Division of the High Court of Justice, with Statutes and Forms; by W. F. A. Archibald, Esq., Barrister-at-law, author of "Forms of summonses and orders, with notes for use at Judge's Chambers." London, Stevens & Sons, 1881.

WILLS.

A concise treatise on the Law of Wills; by H. S. Theobald, of the Inner Temple, Barrister-at-law, and Fellow of Wadham College, Oxford. 2nd edition. Stevens & Sons. London, 1881.

SALES.

A treatise on the law of sale of personal property, with references to the American decisions and to the French code and Civil law, by J. P. Benjamin, Esq., Q. C., of Lincoln's Inn, Barrister-at-law; third American from latest English edition, by Edmund H. Bennett. Boston, Houghton Mifflin and Co., 1881.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Conveyances in fraud of Dower. -*Central L. J.*, Feb. 10.

The genesis of perjury.—*London L. T.*

Liability of real estate for debts of deceased persons. -*Southern L. R.*, Feb.

Exemplary Damages for injuries to property, fraud, &c.—*Ib.*

Liability of Innkeeper for loss of guest's property.—*Irish L. T.*, Feb. 11

Notice of unrecorded deed to subsequent purchaser or attaching creditor.—*Central L. J.*, Feb. 17, 24.

Proof of foreign law.—*Ib.*

Sale of goods by parties lacking title.—*Ib.*, Feb. 24.

Mortgagee's rights against purchasers.—*Can. L. T.*, Feb.

The Rights of Volunteers under a Settlement.—*London L. T.*, Jan. 21.

Relief against forfeiture of leases—*Ib.*

Maritime Liens.—*Am. Law Register*, Feb.

Law Society of Upper Canada.

OSGOODE HALL.

MICHÆLMAS TERM, 1881.

The following gentlemen were entered on the books of the Society as students :—

GRADUATES.

Alexander George F. Lawrence, Charles Julius Mickle, Herbert McDonald Mowat, George Edward Evans, John Calvin Alguire, Donald McDonald Howard, John Armstrong, David Alexander Givens.

MATRICULANTS OF UNIVERSITIES.

John R. Shaw, Lewis Elwood Hambly, Samuel McKeown, John A. McLean, Alonze Edward Swartout, William James Tremcear, Frederick George McIntosh, George Francis Burton, James Vance, William Cherry.

JUNIOR CLASS.

Oliver Kelly Frazer, Thomas Reid, Noble Dickey, William Edgar Raney, William H. Sibley, A. M. Taylor, Franklyn Montgomery Gray, Marriott Wilson, Robert Stanley Hayes, John H. Bobier, William Leaper Ross, Samuel H. Bradford, Andrew Dodds, Richard Henry John Pennefather, William Edward Lount, Claude Foster Boulton, William Whittaker, John Wesley Ryerson, Marshall Orla Johnston, John O'Neill, H. D. Folinsbee, Edmund Montagu Yarwood, George Albert Jordon, Neil J. Clarke, Albert Edward Beck, Thomas Brown Patton, Frank Morris Gowan, Edgett William Tisdale, William Kenneth Cameron, Charles Henry Brydges, Horace Walpole Bucke, Edward Ernest Louis Pillsworth, John James Smith.

Herbert Dawson was allowed his examination as an Articled Clerk.

The following gentlemen passed their examination and were called to the Bar :

Rufus Shorey Neville, Ernest V. D. Bodwell, William Cayley Hamilton, Edward A. Peck, George William Begyon, John Henry D. Munson, Charles Crosby Going, Thomas Trevor Baines, Frank Marshall McDougall, Alfred Beverley Cox, Archibald James Sinclair, George H. Muirhead, Henry Yale, Sidney Wood, Newenham Parkes Graydon, James Russell, Archibald Stewart, Robert Cassidy, Victor Chisholm, William Humphrey Bennett, Frank Andrew Hilton, George Henry Smith, John Lawrence Dowlin, William Proudfoot, George Miles Lee, Daniel Fraser McWatt, Henry Boucher Weller, Nathaniel Mills ; the names are arranged in order of merit.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar :

Edwin Taylour, English Honors and Gold Medal ; Adam Johnston, Honor and Silver Medal ; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson ; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases :—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law :—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B.I., vv. 1-300 ; or
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20-36, B. V. c. 8-23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

Canada Law Journal.

VOL. XVIII. MARCH 15, 1882. No. 6.

DIARY FOR MARCH.

17. Fri.. .. St. Patrick's Day.
18. Sat.... Princess Louise born, 1843.
19. Sun.. . *4th Sunday in Lent.*
23. Thur.. Sir George Arthur, Lieut.-Gov., U.C., 1838.
26. Sun. .. *5th Sunday in Lent.*
28. Tue .. Canada ceded to France, 1632.
29. Wed... The Wills Act assented to, 1873.
30. Thur.. B. N. A. Act assented to, 1867.
31. Fri.... Lord Metcalfe, Gov. Gen., 1834.

TORONTO, MARCH 15, 1882.

THE *Albany Law Journal*, in graceful language, rejoices that, "the good and gracious lady who nominally rules the British Empire, has escaped the hand of the assassin." It is, indeed, a subject of deep gratitude and the kind wishes of our most able contemporary are fully appreciated. The word "nominally," however, is much less appropriate then might be generally supposed. The power and influence of a sovereign, who, though strictly constitutional in her acts, is beloved by a people, enjoying the freest government in the world, both for her private virtues and her patriotism, and who is *always* in office and personally conversant with all state matters, and has "kept the run of them" for so many years, is practically enormous.

The *Journal* concludes by saying that they "will watch the proceedings with a curious interest, to see if the British bench and bar can improve upon our dealing with Guiteau;" we trust they will have no cause of complaint. The extraordinary scenes that took place on the occasion of the trial alluded to, seem to us to have been in the main an outcome of the instincts, habits, and institutions of a Republic, built up rapidly from a number of different races. But though there is the extravagance of expression, and the self assertion appertaining to strong youth in the great nation that we are proud to call our kinsman, its heart is right, and its head is more "level" than the occasional froth on the surface might sometimes seem to indicate.

WE are glad to see the Library Committee have anticipated the suggestion in our last number, and have purchased not only the digest of the *American Law Register*, which we there referred to, but the whole series of volumes from the commencement. There can be no doubt that this new acquisition will be found a most valuable source of information, especially on points arising in connection with corporation law. In the January number, for example, is contained a full report of a recent case in Missouri, where it was held that a verbal agreement to insure is binding, and may be specifically enforced. To this are appended a series of notes, in which the writer observes that since *Warren* v. *Ocean Ins. Co.*, 16 Me. 439, where a waiver of forfeiture, irregularly endorsed by the company's agent upon the policy, was declared binding as a parol agreement, though the usual fee had not been paid,—the validity of a parol insurance has been so frequently and uniformly affirmed, that it may well be pronounced the undoubted American doctrine. He cites *Jones* v. *Prov. Ins. Co.*, 16 U. C. R., as showing that with us the insured cannot sue at law directly for the amount of the loss, upon a parol contract; his only remedy is in equity, or, perhaps, an action at law for the delivery of the policy. Again, in the same number is discussed in a similar manner the character of a certificate of stock, accompanied by a bill of sale and power, in the hands of a *bona fide* purchaser for value, the stock remaining untransferred upon the books of the company. It is certainly a question whether the plan

adopted by the *American Law Register*, of publishing the most important current English and American decisions, and appending notes to them after the manner of Smith's leading cases, is not calculated to be more useful to the profession than the more common editorial articles on legal subjects.

ONTARIO LEGISLATION.

Upon Friday last the Lieutenant-Governor porogued the Ontario Legislature, which had been in session since 12th January. During the nine weeks session 82 public Acts were passed and a considerable number of private Bills. The most important of the public Acts are the following:—

Chapter 6, "An Act respecting the Jurisdiction of the Court of Appeal." The important section of this Act is that which gives an appeal from all final decisions of a Judge of the County Court, whether sitting in Chambers or in Court, under the provisions of law relating to the examination of debtors, attachment for debts, and proceedings against garnishees, and from any final decision or order hereafter given in any cause or matter disposing of any right or claim.

We presume this section was passed in consequence of the decision of the Court of Appeal in *Sato* v. *Hubbard*, Ap. R. This Act also removes the difficulty which was frequently experienced on account of the signing of judgment in a County Court case ousting the right of appeal. Now an appeal will lie either before or after judgment is signed, provided that security is given within ten days from the decision appealed against, or within such further period, not exceeding 30 days, as a Judge of the County Court appealed from may allow. Provision is also made in this Act, for the reading of the judgment of a Judge of the Court of Appeal who may be unable to attend, and the giving of judgment of three Judges who may be unanimous, notwithstanding the fourth Judge who heard the cause may have ceased to hold office.

Chapter 9, "An Act to amend the Law of Newspaper Libel." This Act is short, but will be found a great boon to decent newspapers. It provides that any report published in a public newspaper of a public meeting shall be privileged, if the meeting was lawfully convened for a lawful purpose, and open to the public, if the report was fair and accurate, and published without malice, and if the publication was for the public benefit. A newspaper proprietor, however, who refuses to insert a reasonable explanation or contradiction by or on behalf of the person complaining, cannot set up the Act as a defence.

Chapter 10, "An Act for the removal of certain defects in the Law of Evidence." This Act adopts the Imperial Evidence Act, 32-33 Vict., cap. 68, as amended by 33-34 Vict. cap. 48. Under it parties to an action of breach of promise of marriage are made competent to give evidence, but there is to be no recovery by the plaintiff unless the evidence in support of the promise is corroborated. Parties to actions for adultery and their husbands and wives are also made competent witnesses.

This Act also removes a difficulty which has been at various times commented upon in the Courts of Justice, viz.—the loss which litigants were put to by the exclusion of the evidence of agnostics and atheists. This can now be obtained under its provisions. In case a judge is satisfied that the taking of an oath would have no binding effect on the conscience of a person tendered as a witness, who is objected to as incompetent to take an oath, the evidence of such person may be taken under this Act upon affirmation. Under 31 Vict., cap. 74, sec. 4 (Dom), and 32-33 Vict., cap. 23, sec. 2 (Dom), any person who, after taking such an affirmation, gives false testimony, is liable to the same punishment as he would be for perjury.

The legislature, having given to the judges full authority over the procedure of the High Court, the next Act, chapter 11., entitled,

"An Act to make provision in regard to certain legal matters," extends their powers to County Courts. It also removes doubts, which we believe were entertained by some of the judges, as to their authority to issue commissions for taking affidavits, since the merger of the Supreme Courts into the High Court of Justice.

Chapter 12, "An Act respecting the restitution of stolen goods." Upon the arrest of persons for larceny and other similar offences, stolen property belonging to many different people is frequently found in the criminal's possession. We understand that in one of our western towns, as many as forty charges were laid against one person for stealing from different individuals. The prosecutors naturally desired to get back their goods, and took this means to obtain a summary remedy, as a judge had, under the Dominion Act, no authority to make a summary order of restitution, unless where the party is actually tried in respect of the larceny of the particular goods embraced in the order. Of course it is simply absurd that the expense and inconvenience of a criminal trial should be incurred for this purpose alone. The present Act meets the difficulty, and enables the judge, after the prisoner has been convicted in one or more charges, to try his right to property so found in his possession and that of the claimant in a summary way. The order made, however, does not finally preclude the prisoner, as he may afterwards recover the goods in question from the person to whom their delivery is directed. The judge also may, if he thinks fit, before making an order, require the claimant to give security for the return of the property to the person convicted, in case the latter should thereafter be held entitled. These provisions were obviously inserted in view of the fact, that a person in custody does not possess the usual facilities for defending his rights. We notice that a section has also been added, reserving the right of the Crown to claim any property of a convict as forfeited for felony.

Chapter 14 is a repetition, verbatim we believe, of the vetoed Act of last Session, entitled "An Act for protecting the public interest in Rivers, Streams and Creeks." As our readers are aware, the Court of Appeal has since the Act was disallowed by the Dominion Government, declared the law to be substantially in accordance with what is alleged in this bill. The question, however, is still pending before the Supreme Court, and it is not improbable that the Dominion Government will refrain from taking any action in respect of this statute until that Court gives judgment.

Chapter 15, "The Mechanics' Lien Act, 1882." This Act extends the protection heretofore given to mechanics, and gives to them to the extent of thirty days' wages, a lien which operates notwithstanding an agreement between the owner and contractor for excluding a lien. This wages lien takes priority over all other liens under the former Act, and over any claim by the owner against the contractor in consequence of the failure of the latter to complete his contract. The affidavit of verification required by the Mechanics' Lien Act is very much shortened. Several persons are permitted to join in one statement of claim. Copying in registry book is dispensed with, and the Sheriff's fees are reduced to twenty-five cents.

Chapter 17, "The Joint Stock Companies Act, 1882." This Act is an important addition to joint stock companies legislation. It authorizes Courts to accept Trusts Companies, which have been approved by the Lieutenant-Governor in Council, as executors, administrators, trustees, receivers, guardians of infants, or committees of lunatics. No company, however, can exercise any of these offices which has issued or is authorized to issue debentures. Hitherto, wherever a company has been incorporated by a special Act, it has been necessary to apply to the Legislature to vary any of its provisions. The present Act gives the Lieutenant-Governor in Council authority, by letters patent, to vary

any provisions of the special Act in the same manner as might have been done had the company been incorporated under the Joint Stock Companies Letters Patent Act. It also contains very convenient machinery for the voluntary winding up or partial winding up of joint stock companies. Up to the present time this could only be done by the company taking proceedings under the Joint Stock Companies Winding up Act of 1878. As these proceedings are unnecessarily cumbersome and expensive, where a company is in a perfectly solvent condition and has few if any creditors, the present Act gives a simple method by which in such cases a company may, by its own officers, divide its assets amongst the shareholders.

Chapter 20, "An Act to extend the application of the Fire Insurance Policy Act." The effect of this Act to extend the statutory conditions of Fire Insurance policies, to interim receipts, and to Mutual Insurance Companies.

We have only space to give the titles of the following Acts which contain very important provisions:—

Chapter 21, "An Act to provide for the crossing of railways by street drains and water mains."

Chapter 22, "An Act to provide for the establishment of free libraries."

Chapter 24, "An Act respecting market fees."

Chapter 25, "An Act to provide for the construction of water works by cities, towns and villages."

Chapter 26, "An Act to make further provision for the construction of drainage works by municipalities."

RECENT DECISIONS.

A few cases still remain to be noticed in the lengthy number of L. R. Chy. Div. issued on Dec. 1.

MORTGAGE—WINDING UP.

In *in re Brown, Bayley & Dixon*, p. 649, FRY, J., held that mortgagees having a right of distress to enforce payment of interest, will be allowed to distrain, after a winding up, for interest accrued while the liquidators were in possession, but not for arrears accrued before the winding up. He arrives at this result by balancing two principles which he says ought to govern the Court in granting or refusing leave to enter and distrain under such circumstances, viz.: (i.) that as far as possible the independent rights of independent persons ought to be respected; (ii.) that the Court will administer the assets of a company among all the creditors at the time of the winding up *pari passu*, and will, so far as is possible, not give any preference or priority between the various creditors. "Those," he says, "are the two principles to be considered. In their generality they are manifestly inconsistent. In my view they are to be reconciled by drawing the line at the date of the winding up." A mortgagee and a lessor, although in one sense independent persons, are nevertheless creditors of the company in respect of any amount due on the mortgage or on the lease at the date of the winding up, and, as such creditors, they ought, in my judgment, to have neither preference nor priority. In respect of any rights arising after the winding up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument, just as any other person must observe those terms."

PARTNERSHIP—ESTOPPEL BY LAPSE OF TIME.

In *Rule* v. *Jewell*, p. 660, the shares of two of the partners in a cost-book mine were forfeited in June, 1874, for non-payment of calls. Now, in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still

partners, although they had taken no steps as to the mine up to July, 1879, when they made a claim. Kay, J., held that even assuming the shares not to have been regularly forfeited, the plaintiffs under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners. He says, p. 667,—"I think the lying by here was entirely analogous to the lying by in the case of *Prendergast* v. *Turton*, 1 Y. & C. Ch. 98. It was a lying by to wait and see whether the concern turned out sufficiently profitable to make it worth while to assert their claim to be partners; and when they think the time is come when it is worth their while to assert their title, then they bring their action. The time during which they lie by being more than six years, I consider the analogy of the Statute of Limitations to be one which is applicable, as it is impossible to lay down a hard and fast rule what amount of time shall be sufficient in every case. * * * Whether it is called abandonment or estoppel seems to me to be indifferent. If it were necessary to call it abandonment, I should be quite prepared to hold that what has taken place in this case amounts to abandonment as between the plaintiffs and their co-adventurers of any interest in this concern."

SETTING ASIDE VOLUNTARY DEED.

In *Henry* v. *Armstrong*, p. 668, the plaintiff had, shortly before going into business on the Stock Exchange, executed a voluntary deed, without power of revocation, by which he conveyed most of his property, real and personal, to trustees upon trust for the separate use of his wife for life, with remainder to his children. He now sought to have it set aside on the ground (i.) that he did not fully understand the purport of the deed, as to which Kay, J., held the evidence did not support it; (ii.) that the deed was irrevocable, which the learned judge held must be disregarded, since any power of revocation would have been entirely inconsistent with the objects of the settlement, and as to the question on whom the *onus* of supporting a voluntary deed when impeached, must be held to rest, he said that despite certain *dicta* to the effect that it rests with those who set up the deed—"As I understand it, the law is, that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside."

SPECIFIC PERFORMANCE OF SEPARATION DEED.

Of the next case, *Hart* v. *Hart*, p. 670, we have already noticed some of the points that arise in it among our Recent English Practice Cases, 17 C. L. J. 412, where our note is taken from 45 L. T. 13, the case being there also reported. The two further points decided which seem to require mention now are:—(i.) that the Court would not refuse specific performance of an agreement for a separation deed on the ground that it provided for the wife having the custody of the children. As to which Kay, J., held that since Imp. Act, 36 Vict., c. 12, sec. 2—enacting that no such agreement shall be invalid by reason only of its providing that the father shall give up the custody or control of the infant children to the mother, but that no Court shall enforce such agreement if it be not for the benefit of the children—the objection no longer holds good. We do not appear to have any such enactment, therefore presumably with us the objection would hold good on the authority of *Hope* v. *Hope*, L. R. 3 P. & M. 226; and *Vansittart* v. *Vansittart*, 4 K. & J. 62, the ground being that it is against the policy of the law for the husband to divest himself of his natural guardianship and custody of the children; (ii.) that it is no answer to a suit for specific performance for defendant to say that, though he understood what the words of the agreement were, he was under a mistake as to their legal effect, As to this Kay, J., says, p. 693—"Of course

it was sought to induce me to accept evidence of what the negociation was, but holding, as I do, that a written agreement has been come to which is complete in its terms and as to which the pleading is simply that the defendant signed it knowing what the words were, and putting a certain meaning of his own upon them, I have held that, under those circumstances, evidence to show that there was another agreement or any omitted terms, is not competent to the defendant. All I have to consider is, what is the meaning in this agreement of the words 'usual covenants.' Therefore I decline to receive evidence from these gentlemen of what the negociation leading up to this agreement was." We will only observe further as to this case that the learned judge held (iii.) that the agreement on the face of it being complete, the arbitration clause contained in it could only come into force in case of difference between the parties, and therefore did not oust the jurisdiction of the Court to settle the deed itself. After reviewing several decisions on this point, he says, p. 689:—"All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that where the agreement, on the face of it, is incomplete until something else has been done, whether by further agreement between the parties, or by the decision of an arbitrator, this Court is powerless, because there is no complete agreement to enforce."

PARTNERSHIP—SHARING PROFIT AND LOSS.

In the last case in this number, *Pawsey* v. *Armstrong*, p. 698, Kay, J.; laid down three points of law in his judgment: (i.) that the agreement to share profit and loss is quite conclusive of the relation of partnership between two persons who do so agree, and it is not possible for one of them afterwards to say, "I was not a partner." "The truth is," he said "that there are certain legal relations which are entered into by agreeing to certain conditions, and when those conditions are agreed to, it is quite idle for people to superadd, or to attempt to superadd, a stipulation that the necessary legal consequences of those conditions shall not follow from the arrangement;" and he distinguishes the present case from one where the agreement was only to share profit, but not loss; (ii.) that partners may stipulate between themselves, and one partner may force another partner, by the threat of dissolution, to agree to limit the rights and dealings of the other partner in certain ways,—as, *e.g.*, that he shall not draw cheques upon the banking account, or shall not enter into contracts, — without preventing thereby the partnership relationship continuing; (iii.) that such restrictions upon the rights and dealings of one of the partners does not prevent him claiming an interest in the goodwill in the event of a dissolution,—"how it can follow from that, that he is restricted in one of his principal rights, as to which there was no stipulation, I confess that I am unable to see," p. 709. This case completes L. R. 18 Ch. D.

The next number of the Law Reports for review comprises 7 Q. B. D., pp. 617 to 663, and 6 P. D. pp. 157–233, and was issued on Dec. 31st.

The digest and tables of cases of the two volumes take up most of the number, but there are a few cases to be noticed.

DEFAMATION—PRIVILEGED COMMUNICATION.

The first case, *Waller* v. *Loch*, p. 619, was a curious one. The plaintiff sued the Secretary of the Charity Organization Society for having reported a bad character of her to an applicant for information who was contemplating affording her charitable relief. The Society was formed for the purpose *(inter alia)* of investigating the cases of applicants for charitable relief. The Court of Appeal held the report a privileged communication, and that in the absence of proof of malice, the action could not be maintained. Both Jessel, M. R., and Brett,, L. J., endorse the definition of Blackburn, J., in *Davies* v. *Snead*, L. R. 5 Q. B. D. 608, viz.:—"Where a person is so situated

that it becomes right in the interest of society that he should tell to a third person certain facts; then if he, *bona fide* and without malice, does tell them, it is a priviledged communication."

BILL OF EXCHANGE—RE-INDORSEMENT—CIRCUITY OF ACTION.

The next case we have to notice is *Wilkinson* v. *Unwin*, p. 636. Here the vendors of goods drew two bills of exchange on the purchaser, and endorsed them to the defendant, who had agreed to become surety for the price of the goods, the defendant re-indorsing them to the plaintiff. The Court of Appeal held (i.) that the vendors were not precluded from suing the defendants on the ground of circuity of action for the amount of the bills, they having been dishonoured at maturity; (ii.) that the contract was not within the words or the reason of the Statute of Frauds, notwithstanding *Steele* v. *McKinlay*, L. R. 5 App. Cas. 754. Bramwell, L. J., said that there were several cases in which it had decided that, if the holder of a bill would not be liable to the endorser whom he is suing by reason of any previous indorsement of his own, he may enforce his claim, because no circuity of action arises; the holder of the bill may always show such circumstances as do away with any liability by reason of his previous endorsement."

WILLS—PROBATE.

In the Probate Division are some cases relating to wills which require notice.

In *In the goods of Aston*, p. 203, the President held that a gift of such money, stocks, funds or other securities, not hereafter specialy devised, as I may die possessed of?' does not amount to a clear disposition of the residue.

In the goods of Hatton was a curious case. An intended will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses. The President refused probate. "A will," he says, "may be composed of numerous papers, which together make but one instrument; but these are separate and independent documents."

In the next case, *In the goods of Stedman*, the deceased made two wills, the first dated May 21st, 1877. Subsequently he executed a codicil, which commenced, "This is a codicil to my will which bears date the 21st day of May, 1877," thereby referring to the former instead of the later will. The President held that the codicil thus referring to the will of 1877, so far confirmed and brought that will into existence, that it must form part of the probate in order that the codicil might have an interpretation put upon it; and that as the second will contained also the most important of the testamentary dispositions which the testator had made and which had never been revoked, the second will must also be admitted to probate, and, he added, —"the general intent to be collected from the three instruments will then become the subject of consideration, if necessary, for a court of construction." He also says, in another similar case reported with this, that—"where the simple mistake has been made as to the date of an instrument, the mistake can be set right; but in a case like this where the mind of the draftsman, whether the testator himself, or some one employed by him, has been really applied to the words of a particular instrument, it is impossible for me to say that it was by mistake that that instrument was referred to instead of another."

In *In the goods of Tomlinson*, p. 209, the President refused probate to a will of a *feme covert*, made during coverture, under a power, and disposing of real property only, though there was an appointment of a executor. He said, "where the will is of a man or a *feme sole*, the appointment of an executor has been held sufficient to entitle the will to proof; but where it is the case of a married woman executing a power by will, different considerations arise. Though it is in the form of a will, as required by the instrument giving the power, it is in fact a conveyance by means of the appointment exercised, and although an

executor is appointed the executor takes nothing in his character of personal representative."

In the next case, *In the goods of Von Buseck*, p. 211, the President held that a will of a foreigner, executed abroad according to the formalities required by English law, but not in conformity with the law of his own country, was invalid; that Imp. 24 & 25 Vict., c. 114, "An act to amend the law with respect to wills of personal estate made by British subjects," did not apply, for here the testatrix was a foreigner; and that sect. 2 of the Naturalization Act, 1870, (cf. R. S. O. c. 97) did not bring the case within the former enactment." As to this he said: "Such an interpretation must, I think, be rejected, unless it were made quite plain that the English legislature intended, with reference to personal property, that an alien should be able to make a will, in a form which is not in conformity with the law of his country. Of course an English Court might be compelled by plain language to give such a construction to an enactment, but it is not to be presumed that anything, which is so contrary to the comity of nations, has been intended by the English legislature, and therefore, I reject that as not being the meaning of this section."

In *In the goods of Brake*, p. 217, where a testator appointed W. McC., of Canonbury, an executor, and there was not in fact any person of that name, but there was a T. McC., of Canonbury, and a W. A. McC., son of the former. The President admitted parole evidence to show who was intended, citing as authority the words of Cairns, J.C., in *Charter* v. *Charter*, L. R. 7 E. & I. 377:—"The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably, and with sufficient certainty, applied."

The cases on points of practice in the number before us have been already noted among our Recent English Practice Cases, and therefore we have now come to an end of the Law Reports for 1881.

On January 2, were issued two small numbers of the Law Reports, comprising 19 Ch. D., p. 1 to p. 60; 8 Q.B.D., p. 1 to p. 69; and 7 P D., p. 1 to p. 5.

COSTS OF INCUMBRANCERS.

In the first of these, the first case which appears to require notice is *Johnstone* v. *Cox*, p. 17, the report of which, in the Court below, is contained 16 Ch. D. 571. It was an action to establish a charge in favour of the plaintiff in priority to other incumbrancers on a certain fund. Bacon, V.C., decided that another incumbrancer had priority over the plaintiff, but as to costs, he held that the fund must be cleared by first paying the costs of all parties, and that what remained must go to the incumbrancers in the order of their priorities. The Court of Appeal reversed this order as to costs, Jessel, M.R., saying:—"As an ordinary rule the costs of incumbrancers are allowed to be added to their securities, if any difficult questions arise as to the priority of incumbrancers, and so on; and unless there has been something vexatious, or something unusual in his conduct, the incumbrancer gets his costs if the fund is sufficient to pay them." And the Court refused to depart from this rule, though some of the incumbrancers, having taken a security on an insufficient fund, might thereby lose both debt and costs.

PRESCRIPTION ACT.

In the next case, *Laird* v. *Briggs*, p. 22, a question arose as to the amendment of pleadings, which we have already noted among our Practice Cases, 17 C.L.J., 346. The Court of Appeal also intimated that, though it was not necessary to decide the point, they must not be taken to agree with the view of

Fry, J., (L R. 16 Ch. D. 440,) that " person entitled to any reversion," in sect. 8 of the Prescription Act (R. S. O. c. 108, sect. 41), included a person entitled as a remainderman; and made some observations as to whether the Court could alter the word "convenient," in the second line of the Imp. Act, into the word "easement," which was apparently intended. It will be observed that our Legislature has made the alteration, and "easement" is the word in our Act. As to the former point, Jessel, M.R., observes that (p. 34) the whole of the section and the whole of the Act is of a strictly technical character from beginning to end; that so far as he could see technical words are used in their proper technical senses; that a reversion in law is not a remainder, the difference being that the reversion is what is left, and the remainder is that which is created by the grant after the existing possession; and that he was not prepared to say that he could find anything in the nature of the case or in the context which would allow him to alter the meaning of the word "reversion."

COMPANY—WINDING UP.

In the next case, *re Great Britain Mutual Assurance Society*, p. 39, the Court of Appeal having discharged an order made for the winding up of an assurance society on a petition presented for that purpose (cf. R. S. O. c. 5. s. 33), and having directed that a scheme should be prepared for a reduction of the amounts of the contracts of the society, Hall, V. C. held that the claims of policy-holders and annuitants which had matured before the date of presentation of the petition must be paid in full. As to this he says,—"It seems to me that the policy-holders whose claims upon their policies have matured, must be dealt with in the same way as other persons who could enforce their claims against the society by action or otherwise, but for the proceedings which have taken place. As a necessary consequence, it follows that these existing liabilities must be cleared off, just as much as if they were debts to persons who have supplied goods to the society."

TRUST IN FAVOUR OF VOLUNTEERS.

In the case of *Paul* v. *Paul*, p. 47, Fry, J., held that an ultimate trust in favour of the next of kin in a marriage settlement could not be revoked, refusing to follow a decision of Melius, V. C. (15 Ch. D. 580). He observes,—"I thought that a gift, conclusively made to or in favour of a volunteer, was incapable of being revoked by the donor; and I thought that one mode of making such a gift was by a completed declaration of trust in favour of the volunteer. In my opinion the law has been conclusively settled in that way."

MORTGAGE—COMPUTATION OF INTEREST.

In *Elton* v. *Curteis*, p. 49, the question before Fry, J., was, in his own words, as follows:—"When there are successive mortgages, and a decree is made for the foreclosure of the subsequent mortgages, and the mortgagor, which in the usual manner directs the computation of subsequent interest upon the amount found due to the prior incumbrancer, is that subsequent interest to be calculated on the total amount certified as due, or only on so much of it as consists of principal, or of principal and costs? To which he answers:—"It appears to me plain that the practice has been and still is to compute subsequent interest upon the entire amount, and that for the reason given by Lord Hardwicke, *Bickham* v. *Cross*, 2 Ves. sr. 471.

AWARDS—PRACTICE.

The last two cases in this number contain two decisions of Chitty, J., on points of practice relating to awards. In the first, *Jones* v. *Wedgewood*, he held that where an action has been referred to an arbitrator by the Chancery Division, it is not necessary to make the award a rule of Court before an order can be made founded on the award. In the second, *Mercier* v. *Pepperall*, he held that a notice of motion in the Chancery Division to set aside the award of an arbitrator should specify the

grounds of objection, by analogy to the practice under the Common Law Proc. Act, (cf. Reg. Gen. Ont. T. T. 141).

In 8 Q. B. D. p. 1 to p. 69, also issued on January 2nd, there appear to be few cases requiring notice here.

CONTRACT OF APPRENTICESHIP.

In the first case, *Royce* v. *Charlton*, Grove, J. and Bowen, J., held that where a deed of apprenticeship contained the usual provision that the master should teach the apprentice, but there was no express provision as to the place where the contract was to be performed by the master, no stipulation could be implied that it was to be performed at the place where, at the time of its execution, the master carried on business and the parties to the deed resided. Grove, J. observes :—"There may, no doubt, be some hardship in the result, and very likely the parties did not, at the time when the deed of apprenticeship was entered into, contemplate the removal of the business, but we must construe the deed as we have it before us."

The next case *Dalrymple* v. *Leslie*, we noted among our practice cases, 17 C. L. J. 480, and there seems nothing to require special notice till the case of *Miller* v. *Brash*, p. 35, is reached, in which a point arose as to the remoteness of damages.

REMOTENESS OF DAMAGES.

The plaintiff, in *Millen* v. *Brash*, delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped to Rome. Owing to the defendants negligence the trunk was sent to New York, and a long time elapsed before it was restored to the plaintiff. In the meanwhile the plaintiff repurchased, at Rome, other articles at enhanced prices in place of those temporarily lost, and it was held this was not too remote damage to be recoverable against the defendants. Lopes, J., says :—"Much depends on whether it was a reasonable and necessary act of the plaintiff to buy these articles in Rome. * * * I think it was both the reasonable and necessary consequence of the defendants' failure to deliver, that the plaintiff should purchase what he did at Rome—a necessity arising from the non-delivery of a trunk, which the defendant, might fairly assume contained wearing apparel. The observations of Mellish, L. J., in the case of *Le Blanche* v. *L. & N. W. Ry. Co.* L. R. 1 C. P. D. 286, are not inapplicable here. * * * I think the plaintiff would have gone to the same expense and bought the same articles for the use of his wife, if there had been no railway company to look to, and if the trunk had been lost by his own fault. There was nothing extravagant or unreasonable in his so doing.

RAILWAYS DETENTION.

The case of *Gordon* v. *The G. W. Ry. Co.*, p. 44, construes for the first time (p 49) a condition of a Railway Co. as to the carriage of cattle, viz.: that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof," except upon proof that it arose from the wilful misconduct of the company. Groves, J. and Lopes, J., held that the word "detention" as used in this condition does not mean any detention by absolute refusal, but by something that prevents the company from delivering the cattle at the proper time; that withholding under a groundless claim to retain the chattels (as, *e. g.* in this case, that the carriage had not been paid) after they had arrived at their destination, and ready for delivery, is not a detention "in the receiving, forwarding, or delivery; it is not in the course of delivery, but an absolute refusal to deliver at the end of the transit.

CRIMINAL LAW.

In *Queen* v. *Martin*, p. 55, the defendant had been convicted, under Imp. 24-25 Vict. c. 100, s. 20 (Dom. 32-33 Vict. c. 20, s. 19) of unlawfully and maliciously inflicting grievous bodily harm upon A and B, in that by putting out the gas, and otherwise, he had

caused a panic to arise among the audience leaving a theatre, whereby many of them sustained injuries, and amongst them A and B. The Court for Crown Cases Reserved held that he was rightly convicted. Stephen, J. observes that the word "malicious" is capable of being misunderstood, and he cites *Reg.* v. *Ward* L. R. 1 C. C. R. 356, and *Reg.* v. *Pembleton*, L. R. 2 C. C. R 119, where Lord Blackburn lays it down that a man acts "maliciously" when he wilfully and without lawful excuse does that which he knows will injure another.

WRIT OF SUMMONS—FICTION OF LAW.

Lastly we have to call attention to *Clarke* v. *Bradlaugh*, p. 63, in the Court of Appeal, the hearing of which in the Court below we noted among the Practice Cases, 17 C. L. J. 343. The Court of Appeal now upheld the decision, holding that to issue a writ of summons is not a judicial act, and the Court may enquire at what period of the day it was issued. Lord Coleridge, C. J., observes that he does not recognize the universality of the rule as to the law taking no regard of fractions of a day even as to judicial acts; for it might, perhaps, be found that even of two judicial acts done on the same day, the Court would inquire, if it were necessary, which was done at the earlier time of the day; but, he said,—"I base my judgment on the safer and unassailable ground that there is an essential distinction between the writ commencing the action, and the writs issued in the course of the action." Brett, L. J., said: "As for the rule that judicial acts relate back to the earliest moment of the day, I know of no principle on which it can be founded. * * * The question is, whether those who promulgated the rule declared the issuing of a writ to be the act of the party, or whether they declared it to be the act of the Court. I think that they declared it to be the act of the party, and for these reasons:—The writ is issued before the action commences, it is issued on the application of the party, it cannot be issued without the application of the party, and it cannot be refused."

SUPREME COURT RULES.

At the opening of the Supreme Court, March 3, Sir Wm. Ritchie, C. J., before proceeding with the business of the Court, as much misapprehension appeared to exist as to the effect of the rules of this Court in regard to the printing required to be done in cases coming before this Court, read, for the information of the Bar, some observations which were addressed to the Minister of Justice on this subject, which showed conclusively, he stated, that there was not the slightest ground for attributing unnecessary printing to any failure on the part of the Court to make rules in reference thereto.

The Chief Justice read at length from the rules of the Court referred to, and called attention to the following memorandum of the Chief Justice and Judges of the Supreme Court in relation to a notice given by Mr. Blake of a resolution: "That in appeals to the Supreme Court of Canada, the printed Records in the Courts below should be accepted for the purpose of the Appeal without requiring the reprint of the same matter":—

The Supreme Court Act, section 28, provides that no writ shall be required or issued for bringing any appeal in any case before the Supreme Court, but that it shall be sufficient if the party desiring so to appeal shall, within the time limited in the Statute, have given the security required and obtained the allowance of the appeal. Section 29 provides tha the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the Court appealed from or a Judge thereof, and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as may be necessary to raise the question for the decision of the Court. Rule No. 2 of the Supreme Court Rules provides that, the case in addition to the proceedings mentioned in the said section 29 shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the Judges of this Court or Courts below, or an affidavit that such reasons cannot be procured with a statement of the

efforts made to procure the same. It must be apparent that it is most necessary, in justice to the Court below and the parties, especially the party in whose favour judgment below has been given (and which it is sought to reverse), that the Court should be in possession of the reasons which led to the conclusion at which the Court below arrived. This is required in all cases by the Privy Council. (*See* Imperial Statute 7 and 8 Vict. c. 69, section 11, and Rule of Privy Council No. xvi.) Rule 3 of the Supreme Court requires the case to contain a copy of any order made by the Court below, enlarging the time for appealing. This is necessary that it may appear to the Court that it has jurisdiction to hear the appeal. Rule 4 provides that the case may be remitted to the Court below in order that it may be made more complete by the addition of further matter. This is obviously necessary as it may happen and has happened that at the hearing it has been discovered that the case did not contain all that had taken place in the Court below and which was necessary for the hearing and determination of the matters in controversy. Rule 7 provides for the printing of the case, and Rule 8 for the form of the case. The form adopted is the same as that used in the Appeal Court of Ontario; this was done for the express purpose of enabling the practitioners in that Court to use the cases printed for that Court, should such be the case agreed on or settled under section 29, to which nothing would be required to be added but copies of the reasons of the Judges under Rule 2, and the order enlarging the time under Rule 3. At the time this Rule, as to the form of the case, was promulgated, there was no rule in Quebec on the subject. Since then we are informed that the Court of Appeal of Quebec had adopted a rule similar to the rule of the Supreme Court. So far from the Court having ever refused to receive the printed matter used in a Court below, when it contained the matter appealed, the attention of the Bar has been repeatedly called by the Bench to the advisability of utilizing the cases printed in the Courts below, when it could be done consistently with the requirements of the Statute, and so saving a large amount of printing. Rule 10 provides that certified copies of all original documents and exhibits used in evidence in the Court of first instance shall be deposited with the Registrar. The same rule provides that the production may be dispensed with by order of a Judge of the Supreme Court, so that if either or both parties think the depositing such copies unnecessary, and shall make the same appear to a Judge in Chambers, an order can be immediately obtained for dispensing with their production. It will be observed that nothing in this rule requires the exhibits to be printed. The Court has had repeatedly to call attention to the unnecessary amount of printing of matter not required by the rules, and has been compelled, in several cases, to direct the Registrar to refuse to allow such unnecessary printing to be taxed as costs in the cause. The statute requires that the contents of the printed case shall be settled by the parties, or by a Judge of the Court appealed from, and the only additional printing which the Supreme Court, by its rules, has prescribed is that of the opinion of the Judges in, and the judgment of the Court below. It may also be noticed that the form and size of the case established by the Supreme Court Rule is precisely the same as that prescribed by section 2 of the schedule annexed to the Order of the Privy Council of the 24th of March, 1871; and in one case from this Court the Judicial Committee of the Privy Council directed that the printed record of the procendings in this Court should be allowed to be used in the hearing of the appeal.

Mr. McCarthy, Q.C., said, in reference to the case which gave rise to the observations in the House of Commons, there appeared to be a great misapprehension. He unfortunately was not present when the matter was referred to, but could say in reference to the case of *McLaren* v. *Caldwell*, that neither their Lordships nor the Court below were to blame for the printing of the books. They were printed by parties now respondents. The only thing that was objected to by the appellants was about printing the plans, and that a Justice of the Court of Appeal said he had no power to dispense with their printing as they were documents necessary to the case. That, he hoped, he would have the opportunity of stating in the House.

Ritchie, C. J., said, with reference to the amount allowed for printing, at the time the tariff was established the greatest possible pains were taken to see what would be a fair remuneration for doing so, and the matter was laid before Parliament, and he presumed the Minister of Justice of that day had examined that tariff, and he had heard of no complaints until now. As far as he was concerned he had done all he could to keep down expenses.

REPORTS.

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

McCALL v. CANADA FARMERS' MUTUAL INS. CO.

Receiver — Joint Stock Co. — Simple contract creditor.

A simple contract creditor of a Joint Stock Company cannot obtain an interim order appointing a receiver of the assets of the company on the ground that the company is insolvent, or has made an assignment of its assets.

Mills v. *Northern Railway of Buenos Ayres Company*, 5 Chy. App. 621, followed.

[February 14, 15.—Boyd, C.

This was an action on a policy of insurance, and for the appointment of a receiver, and for the winding up of the defendant company, and for the distribution of the assets *pari passu* among the creditors of the company. A motion was now made by plaintiff for the appointment of an interim Receiver until the trial of the action. It appeared from the depositions of the president and secretary that the unpaid premium notes had been transferred by the company as collateral security for advances made to the company, and for which the directors were personally liable; and that the rest of the assets of the company had been assigned to the secretary in trust to realise the same and pay the debts due by the company thereout.

The company filed affidavits disputing the plaintiff's claim on various grounds, among others for breach of the statutory condition as to the disclosure of other insurances existing upon the property insured.

Duff, for the plaintiff—The defendant company appears to be insolvent and incapable of paying its creditors in full. On this motion the plaintiff's right to recover cannot be tried; she has made out a *prima facie* cause of action, and that is sufficient to entitle her to have a Receiver appointed. He referred to *Evans* v. *Coventry*, 5 D. G. M. G. 911; *McNeil* v. *Reliance Mutual Ins. Co.*, 26 Gr. 567, R. S. O. c. 161. ss. 69, 75. The Company has no right to assign its assets.

McKelcan, Q.C., for defendant company—A company stands upon no different footing to an individual, and a simple contract creditor cannot obtain an interim injunction, or a Receiver against a company to restrain its dealing with its assets before judgment, any more than he could obtain such relief against any individual debtor. To entitle a person to apply for a Receiver he must have a lien on the property. The question as to the right of legislating on questions of insolvency is one which has been considered of late, and the strict right of the Dominion Legislature to exclusive jurisdiction over such matters was asserted recently by the disallowance of the Provincial Statute. 43 V., c. 10 on the ground of its being an invasion of the jurisdiction of the Dominion Parliament in matters of insolvency. What the plaintiff is in effect attempting to do is to put the defendant company into liquidation, and there is no statutory jurisdiction authorizing such a proceeding, and it would be an extraordinary thing if the Court were to assume jurisdiction to do that which even the Provincial Legislature cannot accomplish by statute, and were to take away the priority which creditors might otherwise acquire under execution against the Company. Here the plaintiff's claim is disputed for non-compliance with the conditions on the policy. He referred to Kerr on Receivers, p.p. 4, 12, 13, 38, 44 and 125; *Bowes* v. *Directors of Hope Life Ins. Co.*, 11 H. L. C. 389. The transfer of assets is no ground for the present motion. A corporation may make an assignment of its assets for the benefit of creditors: Abbott's Dig. of the Law of Corporations, vol. 1., p. 42 to 47, vol. 2, p. 16; *Nelson* v. *Edwards*, 40 Barb. 279; *Clark* v. *Titcomb*, 42 Barb. 122; *Hurlbut* v. *Carter*, 21 Barb. 221; *Hopkins* v. *Gallatree*, 4 Humph. 403; *Robins* v. *Emby Turnpike Co.*, 1 Snieder and M. 207-258; *Montgomery* v. *The Commercial Bank*, 1 Snieder M. 632; *DeRuyter* v. *St. Peter's Church*, 3 N.Y. (3 Coms.) 238; *McCallie* v. *Walton*, 37 Ga. 611-614; *B. and Ohio Ry.* v. *Glen*, 38 Md. 287. A corporation may pledge or mortgage its assets to borrow money or secure a debt; Abbot's digest of the Law of Corporations, vol. 1., p. 41., *Gillett* v. *Campbell*, 1 Den. 520; *Casey* v. *Giles*, 10 Ga. 9; *Brooke* v. *Bank of U. C.*, 4 Prac. R. 162, Dom. Stat. of 1867, 31 Vict., ch. 17, reciting and confirming assignment made by Bank of U. C. for benefit of creditors. The transfer which has been made for the benefit of creditors is a less expensive mode of realizing the estate for the

benefit of creditors than by winding it up under the direction of the Court, it ought not to be interferred with. The trustee is not a party.

Duff, in reply—The plaintiff is suing on behalf of herself and all other creditors. [THE CHANCELLOR—She can only represent creditors of the same class, she cannot represent those having executions]. If the receiver be not appointed the assets of the company may be dissipated before the plaintiff can obtain execution. Under the Judicature Act the plaintiff is entitled to pursue all her remedies in one action, and if she would be entitled, on obtaining judgment, to the relief she now seeks she ought to get it now in the present action. The objections to the plaintiff's claim are matters which do not go to the merits but can be cured. *Cur. adv. vult.*

THE CHANCELLOR—This case is, I think, governed by the case of *Mills* v. *The Northern Railway of Buenos Ayres Company*, 5 Chy. App. 621. In that case the plaintiffs who were creditors filed a bill to wind up a joint stock company, and an application for an interlocutory injunction and Receiver, was made. Lord Hatherley said:—"So far as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument." * * "It is wholly unprecedented for a mere creditor to say:—'Certain transactions are taking place within the company and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed to see whether or not they are doing what is *ultra vires*, and to interfere in order that as by a bill *quia timet* I may keep the assets in proper state of security for the payment of my bill whenever the time arrives for its payment.'—The case must have occurred, of course, many years ago, before joint stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands, yet I have never before heard—and I asked in vain for any such precedent—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a Court of Justice, but which he was about to proceed to establish."

These observations are so entirely apposite to the present case that it is unnecessary to add anything to them. I have not lost sight of the provisions of the Judicature Act which enable the Court to order the appointment of a Receiver "in all cases in which it shall appear to the Court to be just or convenient," (J. A. s. 17, s. s. 8). I do not think it would be either just or convenient at the present stage of this action to grant any such order, and thereupon refuse the motion with costs.

(See *National Provincial Bank of England* v. *Thomas*, 24 W. R. 1013; *Robinson* v. *Pickering*, 50 L. J. C. A. 527, *Hepburn* v. *Patton*, 26 Gr. 597.—Rep.)

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

IN THE GOODS OF TOMLINSON.

Jurisdiction—Judicature Act.

[May 24, 1881.—L. R. 6 P. D. 210.

The Judicature Act has no effect whatever upon the non-contentions branch of the jurisdiction of the Court of Probate in England, and no question of the enlargement of the jurisdiction existing in the Court, can arise in the non-contentions business.

CHINA TRANS-ATLANTIC SS. CO. v. COMMERCIAL UNION ASSURANCE CO.

Imp. O. 31 r. 11—Ont. O. No. 221.

Action on policy of marine insurance—Discovery of ship's papers—Form of order.

In an action on a marine policy, underwriters are entitled to discovery of ships papers in accordance with the practice before the Judicature Acts.

[Dec. 12. C. of A. L. R., 8 Q. B. D. 142—51 L. J. N. S. 132

In such an action the Master had ordered that, "the plaintiff and all persons interested in these proceedings, and in the insurance the subject of this action, by the oath of their proper

officer," do produce, etc.—following the practice in force before the Judicature Acts.

The Court of Appeal, *held*, that the practice obtaining before the Judicature Acts ought not to be disturbed.

BRETT, L. J.—Long before the Jud. Acts, the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means to know how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the under writers. The question, therefore, arose whether this practice had been altered, and it was held in *West of England and S. Wales District Bank* v. *Canton Ins. Co.* L. R. 2 Ex. D. 472, for the reasons there given that it had not.

[NOTE—*The Imp. and Ont. orders are virtually identical.*]

EX PARTE YOUNG—RE YOUNG.

Imp. O. 9, r. 6; O. 16, r. 10; O. 42, r. 8—Ont. O. No. 40; O. No. 100; O. No. 346.

Action against firm—Service—Debtor's summons—Judgment by default.

After the dissolution of a firm, duly advertised, W. issued a writ against the firm in the firm name, on December 18th, 1880. On December 21st the writ was personally served on one of the continuing partners at the firm's place of business. Y., one of the partners, who had retired shortly before the dissolution, was not served. No appearance was entered for any of the partners; and on December 29th., W. signed judgment for default. In June, 1881, W. took out a debtor's summons, under the Bankruptcy Act, 1869, founded on the said judgment and served Y. Y. applied to the Court to dismiss the summons, and his application was refused.

Held, by Court of Appeal, [diss. Brett, L. J.] that the summons should have been dismissed.

[Nov. 28, C. of. A.—45 L. T. N. S. 493.

The above head-note sufficiently shows the facts. It was not shown that the debtor, personally, knew anything about the action until May 11th, 1881. The debt alleged was stated as due upon the judgment obtained by the creditor on Dec. 29th, 1880, not against the person served with the summons, but against a firm sued by the firm name.

SELBORNE, L. C.. after expressing doubts as to whether it was correct to say that Imp. O. 16, r. 10, O. 12, r. 12 (Ont. O. Nos. 100. 57) assumed the existence at the time of action brought, of a subsisting partnership carried on under the firm named in the writ, for that the argument did not convince him "that the effect of a dissolution of a partnership, is to put an end to the partnership relation between the members of the dissolved firm, as to their joint liabilities and assets; or as to transactions in dependence at the date of the dissolution; or that the name of the firm under which their business had been carried on, may not, according to that mercantile usage of which the law does and ought to take notice, still continue to be applicable for any purposes for which the partnership relation may properly be said to continue,"—went on to say that the determination of the appeal did not depend upon these rules only; and that he had come to the conclusion that the summons should be dismissed for the following reasons:—

"The appellant, not having been named as a defendant to the action there is against him, *nominatim*, no judgment at present on record; and, as the whole proceeding under O. 16, r. 10 (Ont. O. No. 100) is new and statutory, it appears to me that a judgment against a firm cannot be sufficient to constitute a debt capable of supporting a petition in bankruptcy, against an individual person not named on the record in any other way than that which is either prescribed by, or can be shown necessarily to result from the provisions of the statute. The Rules of the Supreme Court on this subject, are part of the schedule to the Jud. Act, 1875. The same rules have, in O. 42, r. 8 (Ont. O. 346) expressly provided for this very case, in a manner which appears to me to show that judgment against a firm is not, and ought not to be held conclusive of the liability of any person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner in the firm sued, and who has not been served as a partner with the writ of summons."

COTTON, L. J., agreed with the Lord Chancellor. In the course of his judgment he observes:—

"By English law, previously to the rules made

under the authority of the Jud. Acts, a firm had no such existence as enabled it to sue, or made it liable to be sued. It was a mere name under which certain persons as partners carried on their business, and the individual partners as such were alone capable of suing and being sued. The orders under the Jud. Act, which have the effect of an Act of Parliament, have no doubt varied the law in this respect; the question is, to what extent? In my opinion they apply only to persons who are, at the time of action commenced, partners in an existing firm, not to persons who have been partners in a firm which has been dissolved. In my opinion such persons can no longer properly be called partners. * * * As therefore the members of a dissolved firm are, in my opinion, not properly described as 'partners' and 'partnership' does not properly describe the relationship betweem them, the words 'partners' and 'partnership' ought not in the Orders to be held to apply to those who were formerly, but are not partners, or to a dissolved partnership, unless there is something in the Orders to show that these words are intended to be so applied. I can find no such intention."

BRETT, L. J., dissented from the other Judges, holding (i.) that under O. 16, r. 10 (Ont. O. No. 100) the firm name in which persons "liable as co-partners" may be sued is the name of the firm which existed when the debt was contracted; and a partnership though dissolved is by the rule considered still to exist for the purpose of suing or being sued in respect of transactions which occurred whilst it was in full force; (ii.) that the phrase "where partners are sued in the name of their firm" in O. 9, r. 6, (Ont. O. No. 40) must by the same course of reasoning, refer to the firm which existed when the debt was contracted, and the writ, therefore, may be served upon any one of the partners of that firm; and by the latter part of that rule such service is good service upon the partners of the firm which existed when the debt was contracted; (iii.) that although under O. 42, r. 8 (Ont. O. No. 346) execution could not issue against the alleged debtor in the present case, the judgment was none the less a valid judgment, and the remedies on a valid judgment, other than "execution," could be put in force against him.

NOTE.—*Imp. O. 9, r. 6, and Ont. O. No. 40 are virtually identical. Imp. O. 16, r. 10 and Ont. O. No. 100 were identical before the addition made to the latter by Ont. O. No. 501. Imp. O. 42, r. 8 and Ont. O. No. 346 are identical.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.] [Feb. 28.

REGINA v. CLUFF.

Certiorari—Quashing.

Where the recognizance intered into to prosecute a writ of *certiorari*, which had been returned by the Justices before whom the conviction was had, after the allowance of the *certiorari*, was bad, while the conviction might be good, such allowance was *held* capable of being quashed on the return of the rule to quash the conviction, and that no substantive motion for the purpose was necessary. *Secus*, on a trifling objection or in the case of an undoubtedly bad conviction.

Aylesworth, for the plaintiff.
Watson, contra.

Osler, J.] [March 3.

RE LANGMAN v. MARTIN.

Contract—Arbitration.

L., a builder, and a building committee agreed that all former contracts should be ended and abandoned, L. to give up any claim for compensation except as presently agreed. Certain work already executed was to be viewed by E. and a valuation put upon it; and, should it not conform to the plans, L. was to make it right at his own charges. The building material on the ground was likewise to be valued by E. and paid for at first cost. *Held*, that the construction of the arrangement was that L.'s work was to be paid for at E.'s valuation, who was not an arbitrator, and the agreement was not a submission to arbitration and could not be made a rule of Court.

Aylesworth, for application.
Clute, contra.

CHANCERY DIVISION.

Boyd, C.] [March 3.

CROWTHER v. CAWTHRA.

Distributions, Statute of—Intestacy—Collaterals.

The proviso of the Statue of Distributions that, "there be no representatives admitted amongst collaterals after brothers' and sisters' children," exclude the children of a deceased nephew of the testator.

Moss, Q. C. and *J. Hoskin*, Q. C., for infant defendants.

Robinson, Q. C., for H. Cawthra.

S. H. Blake, Q. C., for Mr. Mulock and Mrs. Cawthra.

McArthur, for plaintiffs.

Proudfoot, J.] [March 8.

CHAMBERLEIN v. CLARK.

Administration—Deficiency of assets—Status of creditors—R. S. O. cap. 107. sec. 30—Secured creditors.

The R. S. O. cap. 107, sec. 30, which enacts that on the administration of the estate of a deceased person, in case of a deficiency of assets, all debts shall be paid, *pari passu*, not only abolishes privilege among creditors, but places them in the same position with respect to each other as in which legatees stand towards each other; and a creditor receiving payment in full either in an action against the executor, or by the voluntary act of the latter, must refund the excess above his proportionate share at the instance of other creditors. A secured creditor need not bring his security into hotch pot, as a condition precedent to ranking on the estate, his lien being expressly preserved by the Act.

H. Cassels, for the creditor moving.

Moss, Q. C., *G. H. Watson*, and *G. Pearson*, for creditors paid in full.

Proudfoot, J.] [March 8.

WILKES v. WILKES.

Will, Construction of—Legacy reducible by testator's debts—Payment of debts.

A testator bequeathed to his sister, M. J., "such sum as will together with what shall be at her credit in my books at Montreal, make $6,000." At the date of the will there was $3,258.42 at M. J.'s credit, but subsequently the testator disposed of his business, and in carrying out the terms of the sale $2,000 was placed at M. J.'s credit in the books, making her credit $5,258.42. Of this sum $3,000 was to be placed on a special account at interest, and $2,000 to be repaid to her by the purchasers in ten years. Her account was then debited with merchandise $5,000; the sum of $258.42 was paid to M. J., and her account was balanced. M. J. then accepted the purchasers' undertaking to pay the $5,000 pursuant to the terms of the purchase, and the books showed nothing due her by the testator at the time of his death.

Held, that the intention of the testator was that M. J.'s legacy should be reduced by the amount of his debt to her at the time of his death, that what had taken place amounted to payment of the debt, and that she was therefore entitled to the legacy of $6,000.

Moss, Q. C., for the executors.

Robinson, Q. C., for the legatee

CHAMBERS.

Boyd, C.] [March 1.

NATIONAL INVESTMENT CO. v. EGLESON.

Security for costs—Payment out.

The plaintiff paid $400 into Court under an order for security for costs, instead of giving the usual bond. He succeeded in the suit. The defendant took the case to the Court of Appeal.

This was a motion, pending the appeal, to have the money in Court paid out to the plaintiff.

BOYD, C., refused the application without costs.

Mr. Dalton, Proudfoot, J.] [March 8, 13.

RE KIRKPATRICK, KIRKPATRICK v. STEVENSON

Reference, Change of.

An application to change the reference in this suit from Goderich to Toronto on the ground that the Master at Goderich was unfitted by ill-health to prosecute it efficiently was granted Costs to be costs in the cause.

Plumb, for the motion.

Hoyles, *Langton* and *Cassels*, for defendants.

Affirmed on appeal.

CORRESPONDENCE.

Office Hours for Law Students.

To the Editor of the LAW JOURNAL.

SIR,—In these days of stiff curricula and high passing standards, when students, to have any chance of a successful examination, require to spend their days and nights in close study and rigid application, when the "burning of the midnight oil" goes on simultaneously with the consumption, by the brain, of that strength and vigor which, at this period of their life, is so necessary for physical development and perfection, I propose to enter a plea on behalf of my fellow students for shorter hours of office confinement.

In the majority of Hamilton offices, students' hours are stated to be "from 8.30 a.m. to 6 p.m.," and not infrequently are these hours extended by pressure of work. Considering the amount of reading that has to be done "after hours," and their sedentary occupation during the day (not to mention the heavy renumeration for their services), such hours are altogether too long. Exercise, and that in the sunshine and open-air, which is so imperatively needful to the student in order to maintain the vitality and energy of the brain, is consequently out of the question, and he goes home in the evening fatigued after a hard day's writing in a dingy office, ill prepared for a "five hours' wrestle" with Blackstone, Broom, Snell, or Smith.

The present hours of law-students (in Hamilton, at any rate) are little better than those of ordinary day labourers, and hardly as good as those of skilled mechanics. This ought not to be the case. Our offices should be at least a little more professional than blacksmith or moulding shops.

The profession in this country, what with "cutting" and "knuckling" is rapidly degenerating into a sort of huckster business, and correspondingly losing that professional *esprit de corps* which is so predominant in the English bar.

Let us then be more professional in our hours and thus dispel the opinion now prevalent with the public, that "a lawyer's office, like a pawnbroker's shop, is always open for business."

While we can in this way materially enhance the dignity of this noble profession, we shall at the same time confer a boon on those young gentlemen who are now striving to qualify themselves to become worthy members of it.

Truly yours,

LEX.

BOOK REVIEW.

A MANUAL OF PRACTICAL CONVEYANCING; By D. A. O'Sullivan, L.L.B. Toronto: Carswell & Co., 1882.

The author of this treatise has selected a subject hitherto untouched by Canadian writers. The object of the present volume is to set out in a concise form the outlines of the law of real and personal property, as applied to practical conveyancing, particularly with the view of assisting the student and young practitioner. The main portion of the work treats of the laws affecting the transfer of real and personal property, including agreements, sales of land, leases, mortgages, assignments, bills of sale, and chattel mortgages, wills, etc., and contains many useful rules and directions to be observed by conveyancers. The remainder of the work is devoted to forms and precedents together with one or two of the more important statutes.

The text is in the most concise form and a large amount of useful information has been compressed into a small space. The chapters on Sales of Land and Personal Property will prove very useful to those who wish to acquire a knowledge of the law particularly applicable to conveyancing, without the necessity of reading large works upon those subjects. The chapter on Wills contains an excellent set of directions for the drawing and executing of wills and a brief sketch of the law relating to wills in general.

The want of a Canadian treatise on the subject of Conveyancing has long been felt, and the English work at present upon the list of books prescribed for students by the Law Society is of little use in Ontario. It would be well for the Benchers to consider the merits of Mr. O'Sullivan's treatise, with a view to adopting it as a text book.

The plan of the work is highly original and is much to be commended for clearness and conciseness. As the author acknowledges, nearly every chapter has been revised by some leading member of the Bar, and this fact in itself is a sufficient guarantee of the general reliability of the work.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

AGENCY.

Commentaries on the Law of Agency as a branch of Commercial and Maritime Jurisprudence, with occasional illustrations from the civil and foreign law; by Joseph Story, LL.D. 9th edition, by Chas. P Greenough. Little, Brown, & Co., Boston, 1882.

CITIZENSHIP.

A treatise on Citizenship by Birth and by Naturalization. with reference to the Law of Nations, Roman Civil Law, Law of the United States of America, and the Law of France; by Alexander P. Morse. Little, Brown, & Co., Boston, 1881.

CORPORATIONS.

A treatise on the Law of Private Corporations other than charitable, by Victor Morawetz. Little, Brown, & Co., Boston, 1882.

DIGEST.

A Digest of the Statutes, Rules and Decisions relative to the Jurisdiction and Practice of the Supreme Court of the United States, by Erastus Thatcher. Little, Brown, & Co., Boston, 1882.

ESTOPPEL.

A treatise on the Law of Estoppel and its applications in practice, by Melville M. Bigelow. 3rd edition. Little, Brown, & Co., Boston, 1882.

INSURANCE.

The Law of Insurance as applied to Fire, Life, Accident, Guarantee, and other none maritime risks, by John Wilder May. 2nd edition. Little, Brown, & Co., Boston, 1882.

Law Society of Upper Canada.

OSGOODE HALL.

MICHÆLMAS TERM, 1881.

The following gentlemen were entered on the books of the Society as students:—

GRADUATES.

Alexander George F. Lawrence, Charles Julius Mickle, Herbert McDonald Mowat, George Edward Evans, John Calvin Alguire, Donald McDonald Howard, John Armstrong, David Alexander Givens.

MATRICULANTS OF UNIVERSITIES.

John R. Shaw, Lewis Elwood Hambly, Samuel McKeown, John A. McLean, Alonze Edward Swartout, William James Tremeear, Frederick George McIntosh, George Francis Burton, James Vance, William Cherry.

JUNIOR CLASS.

Oliver Kelly Frazer, Thomas Reid, Noble Dickey, William Edgar Raney, William H. Sibley, A. M. Taylor, Franklyn Montgomery Gray, Marriott Wilson, Robert Stanley Hayes, John H. Bobier, William Leaper Ross, Samuel H. Bradford, Andrew Dodds, Richard Henry John Pennefather, William Edward Lount, Claude Foster Boulton, William Whittaker, John Wesley Ryerson, Marshall Orla Johnston, John O'Neill, H. D. Folinsbee, Edmund Montagu Yarwood, George Albert Jordon, Neil J. Clarke, Albert Edward Beck, Thomas Brown Patton, Frank Morris Gowan, Edgett William Tisdale, William Kenneth Cameron, Charles Henry Brydges, Horace Walpole Bucke, Edward Ernest Louis Pillsworth, John James Smith.

Herbert Dawson was allowed his examination as an Articled Clerk.

The following gentlemen passed their examination and were called to the Bar:

Rufus Shorey Neville, Ernest V. D. Bodwell, William Cayley Hamilton, Edward A. Peck, George William Begyon, John Henry D. Munson, Charles Crosby Going, Thomas Trevor Baines, Frank Marshall McDougall, Alfred Beverley Cox, Archibald James Sinclair, George H. Muirhead, Henry Yale, Sidney Wood, Newenham Parkes Graydon, James Russell, Archibald Stewart, Robert Cassidy, Victor Chisholm, William Humphrey Bennett, Frank Andrew Hilton, George Henry Smith, John Lawrence Dowlin, William Proudfoot, George Miles Lee, Daniel Fraser McWatt, Henry Boucher Weller, Nathaniel Mills; the names are arranged in order of merit.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar:

Edwin Taylour, English Honors and Gold Medal; Adam Johnston, Honor and Silver Medal; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases:—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law:—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid. B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.
1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Country Churchyard.
The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencemen. of the Second Punic War to the Death of Augustust Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1883, 1885: Emile de Bonnechose, Lazare Hoche.
1882, 1884: Souvestre, Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1882, the following books and subjects will be examined on :

FIRST INTERMEDIATE.

William's Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 130.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobold on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows :—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday after 21st August.
Michælmas Term, third Monday in November.

Canada Law Journal.

VOL. XVIII. APRIL 1, 1882. No. 7.

DIARY FOR APRIL.

1. Sun... *Palm Sunday.*
3. Mon.. Co. Ct. term begins. Co. Ct. sitt. without Jury (ex-York) begin.
4. Tue... Census commenced, 1881.
5. Wed... Canada discovered, 1499.
7. Fri.... *Good Friday.*
8. Sat.... Sup. Ct. Act assented to, 1875. Co. Ct. Term ends.
9. Sun... *Easter Sunday.*

TORONTO, APRIL 1, 1882.

Nasmith v. *Manning*, 5 S. C. R. 417, can hardly be said to be a satisfactory decision. Mere numbers are not, of course, a test of the value of a judgment, but when it is found that a decision is adverse to the opinions of no less than three Chief Justices and Mr. Justice Gwynne, one's confidence in its soundness cannot but be somewhat shaken. The Judges in favour of the appellant were, Hagarty, C. J., Gwynne, J. (when in the C. P. and afterwards as a Judge of the Supreme Court), Moss, C. J., and Ritchie, C. J. Against this array of legal luminaries are found, Burton, Morrison and Patterson, JJ. A., and Fournier, Henry and Taschereau, JJ. S. C. It is not surprising to learn, without intending any disrespect to the majority Judges, that a contemplated appeal to the Privy Council was arrested by a compromise.

WHEN speaking recently of the legislation of last Session, a few words were inadvertently dropped out of a sentence, changing the sense. Chapter 20 of the statutes referred to extends the operation of the Fire Insurance Policy Act to interim receipts and verbal contracts for insurance. It was chapter 20 of 44 Vict. that made the Insurance Policy Act applicable to Mutual Companies.

In addition to the Acts referred to in that article, attention may be called to chapter 7, which applies certain sections of the Division Court Act of 1880 to the Districts of Nipissing, Muskoka, Parry Sound and Thunder Bay. The statute also makes provision for the appointment of deputies in the absence of clerks and bailiffs, and directs clerks to give notice to plaintiffs of the return of *nulla bona* on any execution issued on a transcript of judgment.

A novel publication reaches us from the publishers of the *Albany Law Journal*, called the Index-Reporter. It is to be published monthly, and is a cross between a digest and and an index, and is intended to contain a note of all cases reported during the month preceding publication, in the various courts of England, Ireland, and America. It purposes to collect and arrange all these decisions as fast as they appear. The reference to the contents of each case is of course very short, but, so far as we can see is sufficiently full to give a good idea of the points decided. It does not pretend to be a rival of the digests, being intended rather as auxiliary to them, and to give "a comprehensive glance at the whole field of adjudication for the preceding month." The idea is a good one, and if well carried out cannot fail to be very useful in these busy days. It should have a ready sale at the small annual charge of $5.00.

We are indebted to the veteran Law Clerk of the House of Commons, G. W. Wicksteed, Esq., Q. C., an old and valued friend of this journal, for a copy of his classified table of public general statutes of Canada, wholly or partly in force at the end of the session of 1881, with notices of those repealed,

expired, or effete. Whatever Mr. Wicksteed does is well done. But not merely are we glad to see his handiwork on this occasion for its own intrinsic merits and usefulness, but because these tables of his seem to foreshadow some work on the consolidation of the statutes applicable to the Dominion. Mr. Cockburn has a herculean task before him which should be pushed forward with energy. We confess what with conflicts between federal and provincial rights, questions of jurisdiction without end, disputes as to boundaries, and consolidation of laws perpetually changing, one feels for this youthful Dominion much the same as for the traditional "young ducks whose troubles are just beginning."

MR. Z. A. LASH, Q. C., who some time since succeeded Mr. Hewitt Bernard, Q.C., Deputy Minister of Justice, has resigned his position, and enters again the active practice of his profession. He will be much missed in Ottawa, but will be welcome in Toronto. He was a very efficient public servant, discharging with fidelity and satisfaction the responsible duties of his office. There are few positions harder to fill with advantage to the public and usefulness to the Chief Minister, than that of Deputy Minister of Justice, and every day, as constitutional questions come to the front, there is greater need for a first-rate man ; whilst, of course, in such a position the best lawyer would be practically useless if he were not also a courteous, intelligent and prompt man of business, in whose discretion and ability his chief would have implicit confidence. The man who worthily fills the place of Mr. Bernard *(facile princeps* in the position he occupied) and Mr. Lash, will be one hard to find.

We speak of Canada being a much governed people, with its nearly two dozen "estates of the realm." But we have not heard of a much more judged district then at present presided over by Mr. Justice McCreight, at Cariboo. A correspondent states that there is an adult population of 19, to be looked after by a full fledged, and we believe, learned and competent judge of the Supreme Court, who has been banished from the capital, and divorced from the rest of the court. During the past year, his work is said to have consisted of trying some ten County Court cases. One could almost suppose that this high average of suits to the population, was brought about by the learned judge setting this seething population by the ears, just "to keep his hand in." The government, however, on the Pacific coast do things in a peculiar way. Take another example. Instead of the judges making their own rules of practice, as is usually the case, the Attorney General, under the name of the Lieut.-Governor in Council, takes the task upon himself. If he attended to his own sphere of labour, and let the judges attend to theirs, things would probably be better done

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The changes now being effected in connection with Osgoode Hall Library, are, like all great revolutions, accompanied by considerable suffering to those accustomed to the old order of things. The removal of some of the tables to the room down stairs would no doubt be generally welcomed, provided the gentlemen who are in the habit of doing office work on these tables, were sufficiently closely attached to them to go with them. The unfortunate thing is that the tables go, but a great proportion of the gentlemen in question appear to remain ; and we fear it will be very difficult to extend the eliminating process beyond the tables themselves, unless a room be found up-stairs for the benefit of those who have such work to do. It must be, no doubt, extremely inconvenient to have to go up-stairs to the library whenever it is necessary to refer to a book on practice, or to a volume of the reports. It is disappointing too, to find that although clerks do not "follow tables,"—though

it would be expedient that they should do so,—yet tables follow Benchers', when it would be, we venture to think, very desirable that they should not do so. Thus those who hoped that the old Benchers' rooms would henceforth afford a quiet corner for real study are apparently doomed to be "crushed again," as Lady Jane says in "*Patience.*" So far as we can gather, the intention of the Benchers with reference to these two rooms, is to use them as a test of how much the profession will *stand.*

ADMINISTRATION OF JUSTICE IN BRITISH COLUMBIA.

IN our number of January 16th, under this heading we had reached a point in the judicial history of British Columbia at which all the County Court work was sought to be compulsorily imposed by the Province on the Supreme Court Judges, which had been previously only conferred upon them by a clause in an old B. C. ordinance, as a discretionary power which they might and did use in cases of emergency. The County Court laws and system remain unchanged, running parallel and side by side with the Supreme Court system.

As we understand it, under the existing County Court laws, the Dominion could at any time appoint as many County Court Judges as it chose, for what districts it liked, and these could at this moment enter at once and discharge all the County Court duty of that very interesting but persistent Province, and relegate the Supreme Court Judges back to their Supreme Court duties alone.

The five—we believe that is the number, —at all events all the County Court Judges were pensioned off at two-thirds of their actual salaries, and it was done in a handsome manner too, which ought to count one for us with our fair sister, and no doubt will. But instead of the ordinary plan of replacing them by as many, or even a somewhat reduced number of lawyers as County Court Judges, the Province, or the Governor-General, or both combined, or some authority, we cannot quite tell what increased the number of Supreme Court Judges from three to five by the elevation to the Bench of two gentlemen out of the B. C. Bar.

Surely Canada might be supposed to exclaim, the waters that run down from Alaska must wash the shore of a happy and contented people in B. C.! They have an ample amount of learned and experienced judges; one single court in the country which combines in itself all possible jurisdictions in one, which is not divided in any way by fancy courts, or sub-courts, or side courts. Like the Utopian courts we read of in the poets, the Pacific Columbians have their one court for everything—"*teres atque rotundus,*"—one set of judges for all laws, all people and all occasions. They must surely be contented and happy now. Not quite, as we shall presently see.

A fashion seems to have set in about that time for codifying laws and enacting "great and comprehensive measures." It was *de rigueur* to unify conflicting institutions. And the B. C. Government appears to have caught the soft infection in a form decidedly peculiar, which probably, with some of our readers, will evoke a smile. This Bill was the result. It was ushered in with a great flourish of trumpets by the Lieutenant-Governor of that day in a speech from the Throne as a measure which should "reconcile conflicting jurisdictions" in B. C., abolish the hardships "suitors necessarily experienced in being driven from one court for the relief they sought to another." The fact was, as the B. C. statutes plainly show, that such conflicts in that Province were impossible, as there had always been but *one* Supreme Court, uniting in itself all jurisdictions, and having for a long series of years but one judge, who could not well conflict with himself. We wonder if the Legislature ever heard of the multitudinous bird that in the perplexed

brain of Lord Dundreary was thought to "flock by itself."

Now there were good principles in the Bill which the Judges heartily supported, and had previously advocated, for it gave statutory force to several rules of law which had long been already acknowledged by the Courts, and added a very important statutory rule that where Common Law and Equity conflicted the latter should prevail. The common lawyers were propitiated by commencing the action by writ of summons. The statement of case did duty for a declaration, and thenceforward the statement of reply and all the subsequent proceedings went on under the same rules and with the same, or nearly the same practice as a Bill in Equity. Two or three clauses would have done all that was useful or necessary.

As the matter reads to us, but for the Judges the Bill would certainly have had a decided tendency to create these conflicts, for as it at first stood the Judicature Bill divided the one Supreme Court into a number of separate courts called Divisions or Sides, with a special jurisdiction to each, and, judging from the Bill and the correspondence, the Bill made very careful preparations for inaugurating and perpetuating diversity of judicial views, and destroying rather than encouraging uniformity of decision. The Bill was handed to the Judges for their observations. They appear to have taken it in hand very heartily and vigorously, and in, it is said, the short space of four days altered it to what it is now, with the exception of two sections, 14 and 17, which they did not succeed in changing. The former of these, section 14, affected to make commissions of Oyer and Terminer and general gaol delivery unnecessary in trying criminals; that, they said, probably interfered with the criminal procedure. The latter, section 17, conferred on the Lieutenant-Governor in Council *exclusive* power to make Rules of Court to carry out the Act, for the holding of Assizes, Circuits, Chamber Practice, and relegating to them even the power of imposing taxes on suitors by way of fees; in fact, taking every authority over practice and procedure out of the hands of the Supreme Court Judges, who had held them from time immemorial, as a common law right, interfering with their costume, abolishing their long vacations, and even going so far as to require them to copy out minutes of evidence for suitors. The Judges, after remodelling all the Act, including two clauses 14 and 17, as nearly as possible according to the scheme laid down by the Local Legislature for adoption, next volunteered their services to draw up the Rules of Court by which the Act was to be carried out. In truth, the Judges throughout seem to have endeavoured to aid the authorities in their desire for the better administration of justice, though calling attention to and at last protesting against what they pointed out as calculated to defeat the very objects themselves at which the Legislature declared they aimed. One singular feature presented itself which could not have occurred in any other Provincial Legislature in the Dominion, that is, that there was only one lawyer, and has been only one for the last four years, in the B. C. Local House, and he combines in his own person the office and duties of Chief Commissioner of Public Works, Attorney-General and Premier, so that not only has there been no opportunity of debating, by professional men, in the House the legality or constitutionality of any Bill introduced in the Legislature, but here is the danger of undue pressure from supposed political necessities.

Under these circumstances it need scarcely be a matter of astonishment that some of the measures so passed, should fail to hold their own when exposed to the crucial tests of the Courts. Despite protests of the Judges, however, the act came into force, and it is out of the application of section 17 and some other Acts and sections we shall cursorily refer to, that the present contention in the B. C. Court has arisen.

ADMINISTRATION OF JUSTICE IN BRITISH COLUMBIA.

The *Thrasher Case*, to which we have heretofore referred, brought these matters before the Court. It went to the Supreme Court at Ottawa, but was sent back from them expressly to obtain the opinion of a majority of the judges at Victoria, before that higher court would entertain their application to appeal. Upon an application being made by counsel to be heard by the full Court mentioned in the Judicature Act, and the Local Administration of Justice Act, 1882, the judges set to work to consult the "Rules" which had been made by the Lieutenant-Governor in Council, (the B. C. Government) to ascertain the earliest day at which the case in question could be heard, so as to forward the matter in appeal to Ottawa; preparatory, of course to going on to the Queen in Council. The Supreme Court Rules, 1880, had been enacted to have statutory force under sec. 32 of the Local Administration of Justice Act, 1881, but that also delegated at the same time an *exclusive* power to the Lieut.-Governor in Council, to make and vary new rules, or vary or amend the Supreme Court Rules of 1880, from time to time at discretion.

In the presumed exercise of this discretion, there was issued a copy of a report of the B. C. Committee of Council (and an Order in Council), as required by the Act, in which a full Court had been set for the 9th December in these words:—

Rule 400 (*i.e.* of the Supreme Court Rules, 1880) is hereby repealed, and the following substituted therefor:—

400 A.—A full Court shall consist of not less than three judges of the Supreme Court sitting together. An appeal shall lie to such Court (from specifying whatever may be appealed).

It then repeals a rule of the Supreme Court, and substituted the following therefor:—

401 A.—Sitting of the full Court shall be held in February, for the year 1881, on Monday the 19th December.

The *Thrasher Case* came on before three of the B. C. judges, the Chief Justice, Mr. Justice Crease and Mr. Justice Gray, on a motion for a new trial, but after the proceedings were opened, the hearing was adjourned out of defference to the presumed wish of the executive, until Monday, the 19th December last. On that day (Mr. Justice Robinson having died in the interval, of an accident in circuit, and Mr. McCreight being away in the mountains of Cariboo), the three remaining judges sat. It was then argued that they could not sit there, as a full Court, under rule 400 A., among other reasons for the following:—

1.—That the amendment of the Supreme Court Rules, 1880, was merely a copy of the Report of a Committee of Council, not an Order in Council, which by the construction of the statute was required.

2.—That had it been technically an "Order" in Council, it was ostensibly made in pursuance of sec. 32 of the B. C. Act of 1881, and was therefore invalid, as it professed to be in exercise of a power delegated to the executive, to repeal the Supreme Court Rules, 1880, which the legislature had by the same section erected into a statute. These led inevitably to the larger question which counsel formally raised.

3.—Can the Local Legislature of B. C. make rules of practice and procedure, or in any way interfere with the Supreme Court of B. C., or the judges thereof, under the B. C. Terms of Union, and the British North America Act, 1867; or delegate the power to any other body except the Supreme Court judges—and are not these judges the Common Law depositary of that power? The further argument of that question was adjourned to Thursday, the 5th of January last, to enable the Attorney General, to whom the points were new, to look into the case.

The tripartite questions were very fairly formulated by the Chief Justice, Sir Matthew B. Begbie, we are told, at the request and for the benefit of the Attorney General, very much to the following effect:—

1.—Has the Provincial Legislature power under the B. N. A. Act, 1867, to interfere in any way with the procedure in Superior, District, or County Courts?

2.—If they have such a power, can they exercise it directly, or only by the accustomed channels?

3.—If the Provincial Legislature have the power, and may exercise it by their own deliberation and vote, can they delegate the power to any other body, as is attempted to be done by s. 17 of the Act of 1879, and s. 32 of the Act of 1880. In other words—Are those sections constitutional?

(*To be continued.*)

RECENT DECISIONS.

We can now proceed to the February numbers of the Law Reports, which comprise 19 Ch. D. p. 61—p. 206, and 8 Q. B. D. p. 69—p. 166.

PRACTICE—CONDUCT OF PROCEEDINGS.

The first case, *in re Hopkins*, p. 61, has reference to a point of practice. Next of kin commenced an action for administration against an administrator *cum testamento annexo*, and obtained an order for the administration. Afterwards it became necessary for the said administrator, in his capacity as such, to institute a suit for administration of another estate, and he also obtained an order for administration. A short time after, he became bankrupt. The plaintiffs in the first action now applied for a receiver to be appointed of the estate of their testator, and also for liberty to themselves continue the second action. The Court of Appeal held both parts of the application should be granted, for (i.) whether the administrator's conduct had been fradulent or not, it was not fit that a man who is a bankrupt should continue to be a trustee without the consent of the *cestuis que trust*, therefore it was right a receiver should be appointed; (ii.) the administrator, having become bankrupt, could not be allowed to carry on a suit in which he was plaintiff: therefore the plaintiffs in the other action or else the receiver must carry it on, but the conduct of an action is now never given to a receiver.

CONTRACT—"UNAUTHORIZED" BUT NOT "ILLEGAL."

In the next case, *in re Coltman*, p. 64, the Court of Appeal held that where the trustees of a Friendly Society had loaned money on a promissory note of a non-member, this, although unauthorized by the Act, was not rendered illegal thereby; and since it was not competent to the makers of the note to allege by way of defence that the payees had no authority to lend the money, the trustees could recover against the estate of one of the makers, who had died. Jessel, M. R., observes, p. 69,—"There is nothing in the Act which directly or indirectly prohibits the lending on personal security, beyond the fact that it gives the trustees no authority to do so, and that their doing so would therefore be a breach of trust. I cannot find anything in the Act which could prevent all the members from effectually authorizing a loan on such security, though a mere majority could not do so. There is, therefore, nothing that I can find in the Act of Parliament which makes the loan illegal."

BAILOR AND BAILEE—JUS TERTII.

In *ex parte Davies*, p. 86, after the filing of a liquidation petition, an auctioneer took possession of the chattels comprised in a bill of sale, on the instructions of the holder thereof, and advertised them for sale. The intended sale was, however, stopped by an injunction, and the trustee in bankruptcy asserting his claim, the auctioneer, on his instructions, advertised the goods as for sale by his order. The sale took place, and the auctioneer, having received notice from the holder of the bill of sale not to pay the proceeds over to the trustee, refused to do so. The trustee now applied to the Court of Bankruptcy for payment to him. The Court of Appeal held

the auctioneer was estopped from denying the title of the trustee. "I am of opinion," said Lush, L.J., "that when a person in such a position, knowing of two adverse claims to goods, elects to take the part of one of the claimants and sell the goods as his, he is estopped from afterwards denying that claimant's title. * * * * In the present case the auctioneer deliberately elected to sell the goods for the trustee, with full knowledge of what the title of the adverse claimant was." "As a general rule," said Jessel, M.R., "a bailee of goods cannot dispute the title of his bailor. There are, no doubt, cases in which goods have been taken from a bailee by a third party, who claimed them by title paramount, and, if there has been no fault on the part of the bailee, it has been held that this is a good excuse to him against his bailor. An illustration of this in the old case of *Shelbury* v. *Scotsford*, Yelv. 22. * * * * But in order that the bailee may be able to avail himself of such a defence, he must himself have been in no default. * * * He (the auctioneer) has by his own act precluded himself from setting up the adverse claim of the bill of sale holder."

BILL OF SALE—CONSIDERATION.

In *ex parte Rolph*, p. 98, the Court of Appeal held that a bill of sale of chattels was void as against the trustee in liquidation of the assignor, inasmuch as the consideration was not truly stated in the deed, as required by Imp. 41-42 Vict., c. 31, s. 8 (cf. R. S. O. c. 119, ss. 2, 5); since (i.) part of the consideration named was not paid to the assignor but only agreed to be paid on his behalf; as to which Jessel, M.R., said, p. 102—"The consideration was so much money then paid by the lender to the borrower, and a covenant or agreement by him to pay a further sum at a future day to some one else, and that ought to have been stated in the deed;" (ii.) even if this part of the consideration named were taken to have been paid to the assignor, it was not paid "at or before the execution" of the deed, as therein stated, but was in fact paid a week after the date of the deed.

WITNESS—REFUSAL TO ATTEND.

In *Whitworth's* case, p. 118, the Court of Appeal affirmed the proposition that the only possible ground on which a witness, summoned under the order of the Court to attend and be examined, can base a refusal to attend and answer proper questions, is that the Judge had no jurisdiction to order him to attend. "It may be disagreeable to him to be obliged to attend, but the performance of the duties entailed upon us as members of civilized communities is not always agreeable."

MORTMAIN ACT.

In re Robson, p. 156, involved a very peculiar question arising in connection with the Mortmain Act, 9 Geo. II., c. 36. By various instruments executed at the same time, (i.) a settlor, after declaring some prior trusts, gave his wife power of appointment by will over £20,000, and covenanted to pay over the money to the trustees of the settlement within twelve months; (ii.) the wife by will appointed the £20,000 to trustees on trust to pay certain legacies, and the residue as she should by deed appoint; (iii.) the wife by deed-poll appointed the residue to charitable uses. The settlor survived his wife and died without having paid the £20,000. At his death part of his estate consisted of impure personalty, viz.: £350 secured by a legal mortgage, and £13,700 secured by an equitable mortgage; and part of his estate consisted of pure personalty, which however did not suffice for payment of the £20,000. The question was whether the impure personalty could be resorted to for payment of the charitable dispositions in the wife's will. The Court of Appeal held that it could. Jessel, M.R., says, p. 160—"Though the deed seems to have remained in the man's possession, he was liable to pay this money within twelve months. * * * It was no doubt a debt created without value, but still it was a debt, and, as the law now stands, a debt for all purposes. * * * Within the twelve months he might have called in the mortgage and have received the money, and, that being so, it seems to me that there is no

objection to paying that debt after his death out of his assets, real and personal. * * * * There is nothing devoted in any shape to land or to an interest in land, or kept out of the power of alienation which it was the real object, or one of the real objects, of the statute to keep always in view, and, looking at the nature of the transaction, there is no ground whatever upon which this debt can be refused payment out of the assets." He then proceeds to review at great length, and distinguish *Jeffries* v. *Alexander*, 8 H. L. C., 594, and observes that there were there two circumstances, absent from the present case, and which were treated as the real grounds of the decision, viz.; (*a*) the testator's assets were almost entirely real, and he knew that the charities could not be provided for except out of the real assets; (*b*) the form of the instrument was such that no action could be brought upon it in the lifetime of the settlor, and it only provided for payment if he thought fit. It may be added that in this case of *in re Robson* the Court also held that a direction to hire rooms, the charity in question being for the purpose of providing poor women with rooms, did not bring the gift within the Mortmain Act (p. 166).

TIME—"FORTHWITH."

Ex parte Lamb, p. 169, shows that when an act is required by a statute or a rule of Court to be done "forthwith," the word "forthwith" has not a fixed and absolute meaning, but must be construed with reference to the objects of the rule and circumstances of the case.

SPECIFIC PERFORMANCE.

The next case, *Burrow* v. *Scammell*, arose out of circumstances "of somewhat unusual occurence" p. 180. Defendant agreed to let and plaintiff to take certain business premises for one year, with option of having a longer term at the end of it. The plaintiffs went into possession, and expended money on alterations, but when, at the end of the year, they expressed a wish for a longer term, it was found that the defendant was only entitled to one moiety of the premises, the other being vested in her son, a minor. The mistake of the defendant was perfectly innocent. The plaintiffs claimed (i) specific performance to the extent of the defendant's interest, with proportionate abatement of rent: (ii) an enquiry as to damages. Bacon, V. C., granted the former relief, but refused the latter. He in this acted on the principles laid down by Lord Eldon in *Mortlock* v. *Buller*, 10 Ves. 292, which he says is now to be treated as settled law, viz. that under such circumstances as these,—"If the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection by the vendor that the purchaser cannot have the whole." The V. C. also observes,—"It cannot be disputed that Courts of Equity have at all times relieved against honest mistakes in contracts, where the literal effect and specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to either party. But no case has been referred to, nor, as I believe, can be found, in which the mistaking party has sought for, or could derive any advantage beyond the mere relief from the burden. * * * * To refuse the relief they (the plaintiffs') claim would leave them without protection, and probably expose them to considerable loss, and this for no other reason than that the defendant has made a mistake. The defendant would acquire the right of determining the possession of the plaintiffs at her mere will, and it would confer upon her an advantage wholly unconscionable and inconsistent with the terms of her contract." As to the claim for damages the V. C. said that he found no damage had been sustained, beyond the sums which the plaintiffs must

have laid out under any circumstances in advertisements and the matters connected with their business, and "you cannot anticipate damages."—p. 180.

WILL—"SURVIVOR OR SURVIVORS."

In the next case, *in re Horner's estate*, a testator left his estate to trustees to pay the income to his four chilrden during their lives, and, in the event of any one or more of his said children dying without leaving children who should attain twenty-one, then he directed that the share of such of them so dying should be in trust for the "survivor or survivors" of his said children during their lives, and after their deaths, their respective shares should be in trust for their respective children, and the heirs, executors, administrators, and assigns of such children. There was no gift over. Hall, V. C. held, that the words "survivor or survivors" must be so read, and not as "other or others," so that the issue of a child, who had predeceased the other three children of the testator, were excluded from inheriting the shares of the said other three children on their dying without issue. He said that looking at all the authorities and all the opinions expressed by the judges, he thought he ought to hold that when the sole circumstance to be relied upon is the fact of a gift to survivors for life with remainder to children, the word "survivors" must have given to it its natural and ordinary meaning,—although in *Lucena* v. *Lucena*, L. R. 7 Ch. D. 255 the M. R. calls this a manifestly absurd view leading to manifestly absurd consequences. In the course of the judgment *Wake* v. *Varah*, L. R. 2 Ch. D. 348 is cited, where Baggalley, L. J., held that where there is a gift over on a total failure of issue, the word "survivors" must be read "others."

NUISANCE—REVERSIONER.

In *Cooper* v. *Crabtree*. p. 193, the plaintiff was owner in fee of a cottage, which was let to a weekly tenant. He alleged against the defendant (i.) trespass, in that the defendant had erected on his land a hoarding on poles, etc.; (ii.) nuisance, in that the poles and hoarding produced a constant rattling and creaking noise, and thus caused an intolerable nuisance to him and his tenants. Fry, J. held (i.) plaintiff failed as regarded the trespass, for—"it is familiar law that an action of trespass cannot be brought by any person except the person in possession:" (ii.) plaintiff failed as regarded the nuisance, for it was necessary for him to show either actual injury to the reversion, or that the erection was of such a permanent nature as to be necessarily injurious to the reversion. "Perhaps in substance these two things are the same," p. 198. He had shewn neither. As a recent case in our courts of alleged nuisance arising from noise we may refer to *Hathaway* v. *Doig*, 28 Gr. 461: 6 App. 264.

WILL—COUSINS.

In the last case in this number, *in re Bonner*, p. 201, the testator made by his will an anxious provision for his "second cousins." As a matter of fact, at the date of the will he had no second cousins, nor had he any at his death; but he had no less than eleven first cousins once removed living at the date of his will. Chitty, J., followed *Slade* v. *Fooks*, 9 Sim. 386, in holding that "on a fair consideration of the will with reference to the facts as proved," the first cousins one removed were entitled.

We can now proceed to the February number of the Q. B. Div., comprising 8 Q. B. D. p. 69-166. Curiously enough, however, there appears to be only one case in this number requiring notice here, viz.: *Rosenburgh* v. *Cook*, p. 161, those cases referring to practice contained in it having been already noticed among our Recent English Practice Cases.

VENDOR AND PURCHASER—SALE OF POSSESSORY TITLE.

In *Rosenberg* v. *Cook* the Court of Appeal decided that, where a vendor sold land described in the particulars as "freehold building land," and the purchaser did not object to the title until after the time limited by the conditions of sale, although notified by

the conditions of sale of the conveyance under which the vendor held,—viz. a void conveyance from a railway company,—the purchaser forfeited his deposit on refusing to complete, notwithstanding that the vendor had only a bare possession, and was assuming to sell by a right similar to that of a disseisor or trespasser. Jessel, M. R. says,—"The title of a disseisor is in this country a freehold title, and therefore, although the vendor had a very bad title, and a title liable to be defeated, he had still a title good against all the world, except against those who might be proved to have a better one. * * * The simple fact is that the vendor had a possession in this case, so that a fair sale of that possession is perfectly good." And Brett, L. J. adds,—"If the defendant had had nothing, or if he had had only a revocable license or easement, then, as he professed to sell freehold land, what he professed to sell would not correspond with that which the plaintiff bought." Two of the judges also observed that it was not necessary to decide whether or not the vendor had sufficient possession to ripen into a title under the statute of limitations, though they were of opinion that he had.

The March numbers of the Law Reports are now reached, comprising 8 Q. B. D. p. 165-318; and 19 Ch. D. p. 207-310, the former of which we propose to review in part in our present issue.

ACTION FOR MALICIOUS PROSECUTION.

Hicks v. *Faulkner*, p. 167, being the argument of a rule for a new trial, on the ground of misdirection in an action of malicious prosecution, contains a long and instructive judgment of Hawkins, J., upon the nature of such an action, of which the following summary, framed for the most part in the actual words of the learned Judge, appears to give the drift:—To succeed in an action for malicious prosecution, the plaintiff must allege and establish two things: (i.) absence of reasonable and probable cause, and (ii.) malice. The affirmative of these allegations is upon him. Failing to establish *both* of them, he fails altogether. (i.) Reasonable and probable cause may be defined to be—"(*a*) An honest belief in the guilt of the accused, (*b*) based upon a full conviction, (*c*) founded upon reasonable grounds, of the existence of a state of circumstances, (*d*) which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable *bona fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of—no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by the accused. And the distinction between facts proper and fit and admissible as evidence to establish actual guilt, and those required to establish a *bona fide belief* in guilt, should never be lost sight of in considering cases of alleged malicious prosecution. Many facts admissible to prove the latter would be wholly inadmissible to prove the former; (ii.) as to malice, though it is true as a general proposition, that want of probable cause is evidence of malice, this general proposition is apt to be misunderstood. In an action for malicious prosecution the question of malice is an independent one of fact purely and altogether for the consideration of the jury, and not at all for the judge. The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act (see *Bromage* v. *Prosser*, 4 B. & C. 255, per Bayley, J.); but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. Want of rea-

sonable cause is for the judge alone to determine, upon the facts found for the jury; as evidence of malice it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill will, or any other motive or desire than to do what he *bona fide* believed to be right in the interests of justice—in which case they ought not to find the existence of malice. Thus although it is an anomalous state of things that there may be two different and opposite findings in the same cause upon the question of probable cause– one by the jury and another by the judge—such is at present the law.

NEW TRIAL—VERDICT AGAINST EVIDENCE.

In *Solomon* v. *Bitton*, p. 176, the Court of Appeal held that the rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned judge who tried the action was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to.

WINDING UP—SET OFF.

In the *Ince Hall Mills Co.* v. *Daylas Forge Co.*, p. 179, the question for decision, stated broadly, was, whether in an action brought by a limited company in the course of compulsory winding up by the court for the recovery of the price of the goods delivered by the company *after* the commencement of the liquidation, but in execution of a contract entered into before liquidation, it is competent to the defendant to set off against this debt a debt due to him from the company incurred prior to the liquidation. Watkin William J. held that the set off was not allowable. He said the rights of the parties depended upon whether the debts which were sought to be set off one against the other, were mutual debts between the same parties and in the same interest; and he held they were not. For from the moment of the winding up the company is stopped as an independent going concern; every transaction entered into by it from that moment is void, unless sanctioned by the court; and if it be allowed by the court to continue to carry on its business and enter into or complete transactions, it does so in a new interest and a new capacity, and solely for the purpose of winding up its affairs in the interest of its creditors and shareholders, except in one class of cases having no application to the present, viz., where transactions *bona fide* executed and carried out between the petition and the winding up order may in the discretion of the court be ratified and confirmed. While the practical effects of the defendants' contention would be that the company by a transaction which is void, unless sanctioned and ratified by the court, would be paying one creditor in full out of the assets of the insolvent company in preference to the other creditors.

LARCENY—MONEY DEMANDED WITH MENACES.

In *Reg.* v. *Lovell*, p. 185, the court for C. C. R. followed *Reg.* v. *M'Grath*, L. R. 1 C. C. R. 205, in holding that when A. obtains money from B. by menaces, A. is guilty of larceny, even though some money be owing to A. from B. for work done.

SOLICITOR—UNQUALIFIED PRACTITIONER.

In the next case *Abercrombie* v. *Jordan*, p. 187, the Court of Appeal held that an unqualified person who acts as a solicitor commits an offence against 6-7 Vict. c. 73, s. 2 (R. S. O. c. 140, s. 1) though he acts in the name and with the consent of a duly qualified solicitor. The offender here was an accountant, who, so far from being a solicitor's clerk, as he described himself, really so to speak employed the solicitor in question, C., and carried on business jointly with him, transacting sometimes with C. and sometimes alone various matters which it was alone competent to a solicitor to transact, generally using the name of C. and Co., but sometimes not, and

not always with the knowledge or express sanction of C.

The cases immediately following the last mentioned one, are on questions relating to the Borough Franchise and Lodger Franchise in England, occupying p. 195—p. 262, and are rather of political than legal interest, and need not be further noticed here; while we must postpone our review of the remaining contents of this number, as also of the March number of the Chancery Division until our next issue

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

FOWLER v. BARSTOW.

Imp. O. 11, r. 1; Ont. Rule No. 45.

Motion to discharge order for service of writ out of jurisdiction.

Defendant, in moving to discharge such an order, may shew by affidavit that no cause of action has arisen against him within the jurisdiction.

Nov. 30—C. of A., 51 L. J. N. S. 103.

JESSEL, M. R., after referring to the practice in the above matter before the Judicature Act, and pointing out that both at Common Law and in Equity, the practice was to allow the defendant to put in a conditional appearance, and then to file such an affidavit, said :--

"That being so, the practice as to the admissibility of affidavits to contest the question whether or not the cause of action arose within the jurisdiction was the same both in Courts of Equity and Courts of Common Law; and consequently it is still the practice. Therefore the affidavit is admissible for this purpose. I must not be supposed to decide that the affidavit is admissable to contest the merits of the action. It is not the proper time to try the merits of the action. It is the proper time to try whether the action should be heard in England or in some other country. The question of *forum* is the only question to be tried."

BAGGALLAY, L. J., said in the course of his judgment :—"I quite think that, upon an application to discharge such an order as was made in this case, an affidavit may be made for the purpose of shewing that the Court had no jurisdiction to make an order; but I do not think, as at present advised, it ought to go beyond that unless there were some case of gross fraud or perjury or something of that kind. In ordinary circumstances the affidavit ought not to go beyond the mere fact of shewing there is no jurisdiction to make an order. It may well be that, in order to make a sufficient affidavit for that purpose, it is essential, in some respects, to deal with the merits of the case."

LUSH, L. J. said :—"The difference of procedure was this: The plaintiff, under the C. L. Proc. Act, issued his writ at his own peril; and when he came to act upon it and to apply to the Court to allow him to proceed on the service of his writ, then arose the question whether the cause of action accrued within the jurisdiction or not; and although the question arose at that different stage, it was then open to the defendant to contest the matter upon evidence—upon counter affidavits. The Judicature Act requires leave to be given before the writ is issued at all, which I think is a very great improvement. In each case the practice is the same. * * * In the first instance the order is necessarily *ex parte*, and for this reason: if the person is a party residing abroad, you could not serve a writ upon him out of this Court, because that would be an affront to the sovereign of the country; and therefore you must issue the order *ex parte*. leaving it to the defendant to come in to apply to set aside that order.

NOTE.—*The Imp. and Ont. rules are virtually identical.*

HORNBY v. CARDWELL.

Imp. Jud. Act, 1873, *s.* 24 *(sub-s.* 3*) and s.* 49 : *O.* 16, *r.* 18; *O.* 55, *r.* 1.—*Ont. Jud. Act, s* 16, *(sub-s.* 4*), s.* 32.—*Rules No.* 108. 428.

Third party—Costs—Appeal.

Judgment having been given in a certain action against the defendant, who, in his pleadings, claimed from H., who had been made a third party under Imp. O. 16, r. 18 (Ont. Rule No. 108), the amount of the judgment and the costs of defending the action. H. demurred to the claim for costs, but the Divisional Court overruled the demurrer, and ordered H. to pay all the costs of the action. *Held*, H. having been properly made a third party, the costs of all the pro-

ceedings were in the discretion of the Court, within Imp. O. 55 (Ont. Rule 108), so that there was no appeal by reason of Imp. s. 49 (Ont. s. 32) from the order dealing with these costs.

Dec. 20—C. of A. 51 L. J. N. S. 89.

JESSEL, M. R., after remarking that it was never intended that there should be such a demurrer as this, viz., a demurrer to so much of the relief asked for as includes those costs,—since that is not a separate cause of action, but only a statement of the relief claimed,—went on to consider the question of jurisdiction, and said :—

The words of the section (Imp. s 24, sub-s. 3. Ont. s. 16. sub-s. 4) upon which he (the third party) relied are—"with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant." Now that provision does not relate to costs, but to the same rights in respect of the defence against such a claim. It was agued that before the Jud. Act, the third party could not have been made a party to the action between the plaintiff and defendant, and that therefore his rights are interfered with, because he had a right not to be made a party at all. This, however, is a confusion between respective legal rights and a particular mode of procedure—that is, it is entirely a confusion between rights of property, which are vested rights, and rights in legal procedure. * * * If he (the third party) is made a party, he would not be exempted from costs which were incurred before he was made a party ; for he may be liable to costs from the very beginning of the action. The result, therefore, is that a third party is a party to the cause, and is liable to the discretionary power of the court over costs. * * * It is therefore no answer to say that the discretion may be exercised wrongly. It may be that the third party ought not to be made a party at all, but the answer to that is that he may appeal from such an order, and if there is a *prima facie* case showing that he ought not to be made a party, he will be dismissed from the action."

BRETT, L. J., in the course of a long judgment, said :—"It seems to me that under these rules and orders, there may be a question between defendant and third party which turns out to be in common as between all the parties, and if that be clear, then the third party ought not to be made a third party ; but if *prima facie* there is a question which turns out to be in common, then the third party ought to be made a third party. * * * Now what is the practice? It seems to me that the third party can be brought in, although there may be questions which are not in common between him and the plaintiff. Supposing that to be so, it would not be just or right to make the third party pay costs as between the plaintiff and defendant. The question is whether, if such a wrong were done, the third party has a right to appeal. I should, with the greatest reluctance, feel bound to construe the rules so that, if such an injustice did happen, there should be no appeal. But even if that accident were to happen, it seems to me that the third party is a party to the cause within the rules. If that be so, then the question is whether the court is at liberty to circumscribe the ordinary reading of Imp. O. 55. (Ont. rule 428) as the discretion of the court over costs. I cannot see my way to do so. If therefore any such injustice, which happily has not been the case here, should happen, there would be no remedy. As regards the demurrer, it is clearly frivolous to demur to a claim for damages."

COTTON, L. J., said :—"Under Imp. O. 55 (Ont. rule 428) the court is to have discretion over costs as between all parties to the action ; and the third party having been properly served with a notice under the Jud. Act and rules, has therefore become a party to that action. It is true that Imp. O. 55 says "subject to the provisions of the Act," and we must therefore consider whether these words prevent the third party from being made liable to pay these costs, if before the Jud. Act, he could not have been made liable. Now Imp. s. 24, sub-s. 3 (Ont. s. 16. sub-s. 4) only refers to any right which the third party might have had to defend himself against any claim in another action, but not as regards costs in any action in which he is brought before the court. The Jud. Act only alters the form of procedure, and the third party is still liable to pay such costs as he would have been liable to pay if the old form of procedure had been followed. Here he has been made liable as a matter of procedure to the costs of an action to which he has been made a party. I am of opinion that the true construction of these rules is that they were intended to enable the court in dealing with proceedings in which a third party who has been brought in has raised an allegation, to make that party pay the costs

which have been incurred by reason of that allegation. I am therefore of opinion, without going into the question whether or not a proper discretion has been exercised, that the court has power to deal with the costs of these proceedings as well between the original parties, as between them and the third party. There may be cases in which the discretion might be exercised so as to cause hardship, but we must not, for that reason, cut down the general effect of the power."

NOTE.—*Imp. Jud. Act, 173, s. 24, sub. s. 3. and s. 49 are identical with Ont. Jud. Act s. 16. sub-s. 4. and s. 32 respectively. Imp. O. 16. r. 18 and Ont. r. 108 are virtually identical, except that the former says the notice shall be "stamped with the seal with which writs of summons are stamped." Imp. O. 55, r. 1. and Ont. r 428 are identical.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

P. E. I.]

REID ET AL. v. RAMSAY.

Appeal—Judgment on demurrer not a final judgment—Motion to quash—42 Vict., cap. 39, sec. 3.

In an action for false imprisonment, the defendants (appellants) justified the imprisonment under a judgment entered up in the Supreme Court, and an execution issued thereon. The plaintiff replied that the execution was issued in blank, and that the execution issued without a præcipe therefor ever having been filed.

To both of these replications the defendants below demurred, and rejoined in addition to the fourth replication that forthwith upon the issuing of the writ, a præcipe therefor had been filed; to which rejoinder the plaintiff below demurred.

Judgment was subsequently rendered for the plaintiff on all the demurrers. The defendants appealed to the Supreme Court, and the printed case contained the reasons for judgment, and the following extract from the minutes of the prothonotary of the entry of the judgment delivered by the court :—

"Demurrer argued, 30th October last, when the court took time to consider. The Chief Justice now gives judgment for the plaintiff on all the demurrers."

Held, that the case did not show that a judgment had been entered up on the demurrer, and even if entered up, that the action having been instituted in a superior court of common law, such judgment would not have been a final judgment, from which an appeal would lie within the meaning of the Supreme and Exchequer Court Act, or of the Supreme Court Amendment Act of 1879.

Appeal quashed.

Peters, for respondent.

Thompson, Q. C., for appellants.

EXCHEQUER COURT.

Taschereau, J.] [March

RE PETITION OF RIGHT.

Petition of right—Breach of notarial contract—Representations.

On the 14th of July, 1875, the government of Canada, through one Louis Morin, advertised for tenders for the removal of steel rails from the harbour of Montreal to the Rock Cut at Lachine.

The suppliant tendered for the contract according to the advertisement, and suppliant's tender being accepted, a notarial deed of contract was entered into and executed. The contract provided *inter alia* that "the said party of the second part, hereby undertakes to remove and carry for the Government of the Dominion of Canada, all the steel rails that are actually, or that will be landed from sea-going vessels on the wharves of the harbour of Montreal, during this season of navigation, and deliver and lay on the ground the said steel rails, at the place commonly called Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned.

By his petition of right, the suppliant alleged a breach of the contract by the Crown, and Morin that, acting for the Crown, represented to the suppliant, that some 30,000 tons of rails would have to be removed, and that under such representations the suppliant entered into the contract.

The amount claimed was $10,000.

Held, that under the terms of the contract, the suppliant was entitled to have the removal of *all* the rails landed in Montreal during the season of 1875, and the Government having had five thousand tons of these rails removed by another party, were answerable in damages for the breach of contract.

Held, also, that the representations made by Morin, as agent of the Crown, as to the probable quantity to be landed were unauthorized, and having been made previous to the written contract, could not be said to form part of said contract.

Hall and *Ferguson*, for suppliant.
Hogg, for the Crown.

QUEEN'S BENCH DIVISION.

IN BANCO, MARCH 9.

REGINA V. CHUTE.

Indecent assault—Subsequent conduct—Evidence.

Evidence of subsequent conduct of a prisoner on trial for indecent assault was held admissible, as shewing the character of the assault, and as, in fact, part of the same offence with which the accused stood charged.

Irving, Q.C., for the Crown.
No one appeared for the prisoner.

GANANOQUE V. STIMDEN.

Principal and surety—Discharge of surety.

The contract of suretyship is avoided by a representation which is false in fact, and by which the surety has been induced to become surety, though he who made it believed in its truth.

Britton, Q.C., for plaintiffs.
McMichael, Q.C., contra.

WADE V. KELLY.

Sale by insolvent—Delay of creditors—Change of possession.

A. being unable to pay his creditors parted with his property to his father, taking his notes therefore, the father being conscious of his son's embarassments, but there being no purpose to defraud creditors. The possession of the goods was not changed, nor was there any bill of sale filed. *Held*, that the sale to the father was void as against creditors both as not complying with the Chattel Mortgage Act and as being by an insolvent, the object being to delay, though with no intention to defraud creditors.

Robinson, Q.C., and *Douglas*, for the rule.
Mackelcan, Q.C., contra.

STEERS V. SHAW.

Wild lot—Statute of Limitations.

A surveyor, many years before action, ran a blazed line between plaintiff's and defendant's lots. Along portions of this line a fence was built, and the parties cut and otherwise acted as owners on either side of and as far as this line. It appeared by plaintiff's evidence that it was his intention to question defendant's ownership as soon as he could find the correct line, but he had not interferred with him. It having been found that the evidence of defendant's possession as far as the blind line was sufficient to extinguish plaintiff's title. The finding was *held* right. ARMOUR, J., dissenting.

McMahon, Q.C. and *Douglas*, for plaintiff.
Atkinson, contra.

BATE V. MACKEY.

Bond in replevin—Proceedings stayed on equitable grounds.

B. and C. had timber limits adjacent to those of defendant, but the line between the two was not defined owing to defective description in the licenses. Some 216 pieces of timber were cut within a line run as the boundary of defendant's limits under direction of the Crown timber agent, and defendant replevied them. He did not, however, succeed in his action, by reason of defect in his license, as to 175 pieces, and B. and C. were awarded a judgment of return of these. Having had the replevin bond assigned to themselves, they transferred it to plaintiff, who sued thereon, and though the Court considered that the cutting had been upon what was intended to be granted to defendant, with some appearance at the same time of title thereto on B. and C.'s part. *Held*, that B. and C. were entitled to the

damages sustained by the replevin proceedings, as the condition of the bond had been broken; that the bond was assignable under the statute, and plaintiff was entitled to recover; but as the Court could exercise its equitable jurisdiction of interfering in a case of the kind, a stay of proceedings was ordered on defendant's paying B. and C.'s outlay in cutting and moving the timber up to the replevin proceedings, to be reduced, however, by a set off found in defendant's favor in this action.

Robinson, Q.C., for plaintiff.

Bethune, Q.C., contra.

HAYWOOD v. HAY.

Obstructing sheriff—Conviction under 32-33 Vict. c. 32—Attachment.

The Sheriff of Oxford, in executing a writ of replevin, was obstructed by the defendants, who rescued the goods. On complaint of the Sheriff's officer they were summarily tried before a Police Magistrate and fined under 32-33 Vict. c. 32, by which it is declared that any person discharged or convicted in such a case shall be released from all further or other criminal proceedings for the same cause. A motion afterwards made by the plaintiff to attach the same parties for contempt, was discharged, but without costs.

Robertson, Q.C., for the motion.

Bethune, Q.C., contra.

TRERICE v. BIRKETT.

Sale of shares in vessel—Seizure—Right of surety to co-surety's security.

On a sale of certain shares in a vessel, the purchasers, being unable to pay in money, got O. to give his note, endorsed by them, in favour of the vendor, when O. procured a bill of sale to himself. Vendor having got the note cashed by a bank had to pay it in the end. *Held*, in interpleader between vendor and an execution creditor of O., (ARMOUR, J., dissenting,) that the purchasers became the principal debtors to the bank, and the vendor and O. sureties, and that when the note was paid vendor was entitled to the 24 shares transferred to O. as indemnity against liability on the note.

McCarthy, Q.C., and *Creelman*, for plaintiff.

Robinson, Q.C., contra.

SHEPHERDSON v. MCCULLOUGH.

Boundary—Statute of Limitations.

One R., in 1836, laid out a township into concessions; in front of every alternate concession he left an allowance for road, and a side-road at every 6th lot. Upon the "blind line," between the concessions which abutted, he placed a stake at each side-road. The defendant was the grantee from C., the patentee, of the W. ½ of a certain lot, and the plaintiff became the grantee of the E. ½. Plaintiff and defendant, some years after, employed a surveyor, one L., to find the correct line between them. He started from R.'s stake, and ran from it. A clearing was made by the proprietors up to this line on either side, and a fence erected along it, but not across the lot. Plaintiff told defendant that any timber of his falling on plaintiff's portion must be removed by the defendant. Plaintiff had another survey made a couple of years before action, which placed the line several chains further west than his line; and on this line a fence was put up by plaintiff, and by the defendant taken down. *Held* (ARMOUR, J., dissenting) that there was abundant proof of possession by defendant of the land which had L.'s line as its bound, and as it was long enough to give him title by statute, the verdict in his favour would not be set aside.

Masson for plaintiff.

Creasor for defendant.

COMMON PLEAS DIVISION.

IN BANCO, MARCH 10.

O'DOHERTY v. THE ONTARIO BANK.

Husband and wife—Separate equitable estate—R. S. O. ch. 125, sec. 2, 5.

A husband, not being in debt or engaged in or contemplating engaging in business, bought certain land and stock from one C., the purchase money comprising nearly all the property the husband had, and procured C. to make the conveyance thereof direct to the wife, who had been married to her husband in 1860, without any mariage contract or settlement; and the wife mortgaged the property to the plaintiff. In an interpleader action between the plaintiff and the defendants, subsequent execution creditors of the husband:

Held (OSLER, J., dissenting), that the property in question was the wife's equitable separate estate, and was not effected by secs. 2 and 5 of the R. S. O. ch. 125.

The plaintiff was therefore held entitled to recover.

McCarthy, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

BECKETT V. JOHNSTON.

Sale of land for taxes—Assessment, invalidity of—Sec. 155 of Assessment Act, 1868—*Township Clerk—Right to purchase.*

Ejectment by plaintiff under a tax deed, as the assignee of the tax purchaser, who was the township clerk. The sale was for the taxes alleged to be due for the years 1871 and 1872. The land was described on the assessment roll for 1871 as the "S. pt. 12, 53 acres," and for 1872 as "S. E. pt., lot 12, 53 acres." Parts of lot 12 were owned respectively by F. and C., and part laid out as a village, and it appeared that the land, whether taken as the south or south-east part, included parts respectively of F. and C.'s land, which was already assessed against them, and also certain of the village lots.

Held, that the plaintiff's bill failed; for that the assessment was invalid, and that the defect was not cured by sec. 155 of the Assessment Act of 1868.

Held also, that the purchase by the township clerk was a voidable transaction.

J. B. Clarke for the plaintiff.

Bethune, Q.C., for the defendants.

MCLAREN V. CANADA CENTRAL RAILWAY CO.

Fire, loss by—Negligence—Contributory negligence—Evidence—Findings of jury.

In an action against the defendants, a railway company, for negligence, whereby the plaintiff's lumber caught fire from one of the defendant's locomotives and a large quantity thereof was burnt, the jury found that the fire which caused the damage came from the defendant's locomotive, from imperfection or structural defect in the smoke-stack, by reason of the cone being too close to the netting, and the bonnet rim not fitting to the bed so completely as it should have done. They further found that the plaintiff was not guilty of contributory negligence by reason of his piling his lumber on the defendants' ground, with their consent, within a short distance of the track, and not having sufficient means at hand for extinguishing fires should they occur.

Held, that the evidence set out in the case, fully supported the findings of the jury; that as to finding that the cone was too close to the netting, it could not be supported by the evidence if it meant that it in consequence acted prejudicially to the netting, but that the finding meant that the cone was too high above the bonnet rim and so too close to the netting, and in consequence the sparks deflected from it instead of being sent above the bonnet bed or below it, and thus escaped from the stack; and also that although the finding that the bonnet rim did not fit so completely as it should, was in a sense indefinite in not stating thereby sparks could or did escape, this was covered by the other findings.

The question as to the bonnet rim fitting the bed was not put to the jury until after they had rendered their verdict and answered the other questions, and after the learned Judge had been moved for judgment upon those answers, but it was done while all the parties and their counsel were present, and before the jury had left the court room.

Held, that the question was properly put to the jury.

McCarthy, Q.C., and *Creelman*, for the plaintiffs.

Bethune, Q.C., and *Walker* (of Ottawa), for the defendants.

WOODWARD V. SHIELDS.

Adding parties—Judicature Act, rule 90—Costs.

Action by plaintiffs for $460, as assignees under an assignment from the assignee in insolvency, of the estate of W. and A., who had become insolvent in 1879. At the trial the learned Judge held that under the circumstances, set out in the case, this amount did not pass to the plaintiffs under the assignment to them, but if at all belonged to the insolvents; but refused to add the insolvents as co-plaintiffs, because the defendant was not in a position to know whether he had a defence as against them. During the sittings, the defendant having had sufficient time to acquaint himself of his rights, and showing no

defence, the Court, under the Judicature Act, rule 90, directed the insolvents to be added and judgment to be entered for the plaintiffs for the amount claimed, but under the circumstances without costs.

Reeve, for the plaintiff.

Tilt, for the defendant.

RUSSELL V. THE CANADA LIFE ASSURANCE COMPANY.

Insurance—Warranty—Adding pleas.

Action on a policy of insurance. By the terms of the policy, the declaration signed by the assured and the relative papers were made the basis of the contract, with a proviso that in case of any fraudulent or wilfully untrue material allegation being contained in the said declaration, or if it should thereafter appear that any material information had been wilfully withheld, or that any of the matters set forth had not been truly and fairly stated, then the policy should be void. The application contained a number of questions and answers, and at the foot was the declaration above mentioned, whereby the assured declared that to the best of his knowledge and belief the foregoing statements and other particulars were true, and that if any untrue averment had been intentionally made in the declaration or in the replies to the company's medical adviser in connection therewith, the policy should be void. To the questions in the application as to name and residence of usual medical attendant, and for what serious illness had he attended him, the assured untruly answered, none; and to the question by the medical adviser "as to what other disease or personal injury, and from whom have you required professional assistance, and how long is it since you last required such assistance," the assured untruly answered, none.

Held, that the answers to the questions were warranties, and by reason of their untruth the policy was void.

The pleas setting up these defences were added at the trial, and after the trial had been in progress for some time. The action was commenced before the Judicature Act came into force, but the trial was thereafter.

Held, that whether under sec. 8 of the A. J. Act or Rule 128 of the Judicature Act, the pleas were properly added.

Bethune, Q.C., for the plaintiff.

McCarthy, Q.C., and *Bruce* (Hamilton) for defendants.

Osler, J.]

ALLAN V. CORPORATION OF AMABEL.

Municipal Corporations—Statute labour—Non-resident lands.

Held, that a Township Council can provide for the performance of work upon the roads of their township to the extent of the commutation tax charged in respect of non-resident lands, and for payment therefor out of the general funds of the municipality before such tax has been received from the County Treasurer; and that such work is not necessarily restricted to be performed in any particular statute labour division.

George Kerr, for plaintiff.

J. K. Kerr, Q.C., for defendant.

CHANCERY DIVISION.

CRUSO V. BOND.

Mortgage—Acceleration clause—Foreclosure—Election.

In an action of foreclosure upon a mortgage which contains a clause by which the principal falls due upon default made in payment of any instalment of interest, if the plaintiff claims the benefit of this clause and calls in the whole mortgage debt, he is bound by his election, and must accept principal, interest and costs when tendered.

Eddis, for plaintiff.

Moss, Q.C., for defendant.

SMITH V. DOYLE.

Fraudulent conveyance—Unsatisfied judgment—Statue of Limitations.

An action to set aside a conveyance as fraudulent as against the creditors of the grantor, a judgment debtor, will lie at any time within twenty years from the recovery of the unsatisfied judgments.

Donovan, for plaintiff.

O'Donohoe, Q.C., for defendant.

O'GRADY V. MCCAFFREY.

Tax sale—Unpatented lands—Subsequent Crown grant—Improvements under mistake of title.

When unpatented land is sold for arrears of taxes, the purchaser takes only the interest of the

person assessed, and that subject to the right of the Crown to grant the fee simple to whomsoever may be found entitled thereto.

A person in possession of land under a mistake of title, cannot be allowed for improvements made by him after litigation commenced with him concerning the title.

Maclennan, Q.C., for plaintiff.

Beaty, Q.C. and *Lees*, Q.C., for defendant.

FLETCHER v. RODDEN.

Mortgage—Foreclosure—Recovery of land—Statute of limitation.

The remedy by way of foreclosure or sale in mortgage suits, is a proceeding to recover lands within the meaning of R. S. O. cap. 108, sec. 4.

Therefore, when a suit to foreclose a mortgage was commenced ten years and eight months after the date of the default in payment, and the plaintiff claimed payment of the mortgage debts, possession and foreclosure,

Held, that the only relief to which the plaintiff was entitled, was judgment upon the covenant for payment.

C. H. Ritchie, for plaintiff.

Moss, Q.C., for defendant.

MCDOWALL v. PHIPPEN.

Mortgage sale—Growing crops, purchaser's right to.

Upon default made in payment of a mortgage, the mortgagee has the unquestionable right to take possession of the property in the state in which it then is as to crops, and to hold the whole as his security.

Therefore, were land was sold under a decree of the Court of Chancery made in a mortgage suit without any reservation of crops,

Held, that the purchaser took all that the mortgagee could beneficially hold possession of, and was entitled to the growing crops mature and immature, no severance of the same having taken place.

P. McGregor, for plaintiff.

Moss, Q.C., for defendant.

CHAMBERS.

Mr. Dalton, Q.C.] [Feb. 2.

CORNISH v. MANNING.

Time, computation of—Execution—Summons.

A defendant was served on the 22nd December, and a *fi. fa.* was issued on the 10th January.

Held, that the *fi. fa.* was not issued too soon, and might have been issued on the 9th January.

Held also, that in the computation of time in this case Sunday counts.

The ten days for appearance mentioned in the writ of summons includes the day of service.

Holman for plaintiff.

H. J. Scott for defendant.

Osler, J.]

IN RE ELLIOTT.

Solicitor—Taxation—Costs.

Where an order has been made referring a solicitor's bill for taxation, and directing the attorney to refund what, if any thing, has been over paid, it is proper to obtain a subsequent express order for payment of the balance found due by the Master's report.

Aylesworth for the solicitor.

Shepley for the client.

Mr. Dalton, Q. C.] [March 25.

OMNIUM SECURITIES CO. v. ELLIS.

Pleadings—Notices, service of.

Held, that pleadings and notices in suits in all cases must, in the absence of special arrangements, be served either upon the solicitors for the parties or their Toronto agents.

Aylesworth for the defendant.

H. Cassels for the plaintiffs.

COURT OF APPEAL.

From Chy.] [March 24.

JESSUP v. GRAND TRUNK RAILWAY.

Deed poll—Specific performance—Land acquired by railway on special condition.

The facts of this case are fully set out in 28 Grant, p. 583.

On appeal, the plaintiff's bill was dismissed with costs. The Court holding that the bargain

between the parties was in effect, that the company might have the land for nothing if they should place a station upon it. This they did, and thereby complied with the condition, but the Court did not think that they were compellable to keep the station there for ever, but that if such relief had been asked, re-possession would have been decreed to the plaintiff, the company having no ownership of the land, except in connection with the employment of the same for the designad purpose and could not use the said land for any other purpose.

Bethune, Q.C., for plaintiff.

S. H. Blake, Q.C., for defendants.

From C. P.] [March 24.

BIRKETT ET AL. v. MCGUIRE ET AL.

Principal and surety—Giving time—Partnership—Appropriation of payments.

The judgment of CAMERON, J., reported in 31 C. P. 430 (noted *ante infra*, vol. 17, p. 63), reversed. A partnership having been dissolved, one partner continued the business and assumed the debts of the firm, and, as between himself and the retiring partner, became the principal debtor, of which facts the plaintiff as creditor had notice. *Held*, that as the relationship was not originally one as between principal and surety, and not changed into a liability of that nature by the creditor, his giving time to, or taking a negotiable security from, the continuing, partner did not discharge the original co-debtor.

Discussion on the appropriation of payment in such case.

Bruce (Hamilton), for plaintiffs.

Mackelcan, Q.C., for defendant.

From Chy.] [March 24.

INTERNATIONAL BRIDGE CO. v. CANADA SOUTHERN RY.

CANADA SOUTHERN RY. v. INTERNATIONAL BRIDGE CO.

Junior Counsel—Tolls—Practice—Reference to Master.

The same points which had reference to the payment of tolls by the railway, for the use of the bridge being raised in both suits, they were argued together in the Court below, and the decree then made was now affirmed.

Junior counsel are not at liberty to take positions in argument, which conflict with the positions taken by their senior counsel. To require payment of tolls for the user of the bridge, is incident to the corporate powers of a corporation of the character of the International Bridge Co.

The contention that the tolls are already fixed by statute is not sustained by an examination of statutes of the Bridge Co.

The percentage yielded to the shareholders upon their capital expended upon the bridge and its approaches, and other expenses incidental to the undertaking, is too narrow a test to take of the reasonableness of the tolls, especially in the case of such a construction as the bridge in question, it was right that a sinking fund should be set apart to answer expenses occasioned from time to time by accidents to the bridge.

Where a question is directly raised by the pleadings, and is one of the principal grounds upon which the plaintiff comes into Court, and is proper for the decision of the Court, to refer it to the master would be to transfer to him a question which is distinctly presented to the Court for its decision, and upon which both parties have given evidence in order to the obtaining of the judgment of the Court upon it, and therefore questions of this nature should not be made the subject of a reference.

Crooks, Q. C. and *Cattanach*, for defendants.

S. H. Blake, Q. C. and *W. Cassells*, contra.

From Q. B.] [March 24.

FURLONG v. CARROLL.

Fire—Negligence.

The defendant, while working in his own field, threw a match, which he supposed he had extinguished, upon the ground, which set fire to some combustible matter. The fire could have been put out, but the defendant, after raking the materials together, left it to burn out, under the impression that he had confined it to one spot. After burning four or five days the fire communicated with the plaintiff's premises. The verdict of the jury was in favor of the defendant.

Held, reversing the decision of the Queen's Bench refusing a rule for a new trial, that the defendant was liable for the damage caused to the plaintiff, and a new trial was ordered without costs.

Meek, for plaintiff.

Bethune, Q.C., and *Deroche*, contra.

Spragge, C.] [March, 24.

LAVIN v. LAVIN.

Voluntary conveyance—Undue influence—Independent advice.

A conveyance of land from a man ninety years old to his son, was prepared on the instruction of the son. The deed recited that the grantee had agreed to pay his son $10 a month for his life, but no such agreement was in fact proved, and there was not any other consideration. It was shown that the deed had not been explained to the father, and the clerk who witnessed the execution of the conveyance could not say that he had read it over to him. There was not any direct fraud established, but the father was under the influence of the son, and had acted without advice.

Held, affirming the decision of the Court below, as reported, 27 Gr. 567, that under these circumstances the deed should be set aside.

O'Donohue and *Haverson*, for appeal.

J. H. Macdonald, contra.

From C. C. Oxford.] [March 24.

WILSON v. BROWN AND WELLS.

Remission to County Court for amendment—Discretion as to amending.

This Court having been of opinion that the record should be amended, remitted the cause to the Court below in order that the record might be so amended and a verdict entered for the plaintiff against B. alone (6 App. R. 411). The judge of the County Court, instead of entering such a verdict, ordered a new trial between the parties, who were to be at liberty to amend as they might be advised, so that B. might raise any defence which it was not considered necessary to raise in the action on the joint liability.

Held, that the direction of the County Court Judge as to the way he thought it right that the application to amend should be made was an exercise of his discretion with which this Court would not interfere.

McCarthy, Q.C., for the appeal.

Falconbridge, contra.

From Proudfoot, V.C.] [March 24.

DAVIDSON v. MAGUIRE.

Post nuptial settlement—Valuable consideration—Insolvency.

A marriage having been agreed upon between M. and the defendant, the father of the latter agreed to convey a lot to her as her marriage portion, if M. would erect a home upon it, which he intended building on land of his own. M. agreed to this proposal, and the marriage took place. During the following year M. put up a dwelling on the land of his father-in-law which was thereupon conveyed to the defendant; and two years afterwards M. became insolvent.

Held, affirming the judgment of the Court below, that the erection of the house by M. was the consideration for the conveyance of the land, and that the transaction could not be treated as a voluntary settlement; and there being no fraud in M. building in the manner stated, the dealings between them could not be impeached.

Bruce, for appellant.

Bethune, Q.C., contra.

From Q. B.] [March 24.

NEILL v. UNION MUTUAL LIFE INS. CO.

Life assurance—Unpaid premium.

One of the stipulations of a life policy was that, if any of the premiums should not be paid at the time limited therefor, the consideration of the contract between the Co. and the assured should be deemed to have failed, and the Co. to be released from liability thereunder. Another stipulation provided that, if an overdue premium was received, it would be upon the express understanding and condition that the party was in good health, and if the fact were otherwise, the policy should not be put in force by the receipt of the money. A check had been given for a quarterly premium, with a request to hold it for a short time as there were then no funds. Subsequently it was presented on several occasions, but without being paid. On the 21st of October funds were provided, but as it was after banking hours before the agent was informed of the fact the cheque was not presented, and the receipt had been returned by the agent. That night the assured was killed.

Held, affirming the judgment of the Court below (45 U. C. R. 593), that the policy lapsed the day after the premium became due; that payment alone could then revive it, and the facts did not establish payment or anything dispensing with it.

S. H. Blake, Q. C. and *G. H. Watson*, for plaintiff.

C. Robinson, Q. C. and *Mulock*, contra.

From C. P.] [March 24.

PAGE v. AUSTIN.

Sci. fa—Shareholder—Joint Stock Co.—Illegally issued stock.

The Ontario Wood Pavement Company, incorporated under 27-28 Victoria, ch. 23, with power to increase by by-law the capital stock of the Co. so soon as, but not before, the original stock was all allotted and paid up, assumed to pass a by-law increasing the capital stock before the original amount had been paid up. The plaintiff, who was an execution creditor of the Co., whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against the defendant as holder of shares of the new or increased capital stock.

Held, that the by-law so passed by the Company being *ultra vires*, the alleged shares of the defendant had not any existence in law, and, therefore, that the plaintiff failed to establish that the defendant was a shareholder within the statute, and consequently was not entitled to recover; but the appeal being allowed on a ground not taken in the Court below or assigned as a ground of appeal, the Court refused the appellant his costs in appeal.

C. Robinson, Q.C., and *Maclennan*, Q.C., for appellant.

Bethune, Q.C., contra.

From Chy.] [March 24.

HODGINS v. ONTARIO LOAN CO.

Representation—Collateral contract.

When a loan company, in order to advertise the advantages of their institution, caused a document to be circulated among the public, the natural meaning of which was that a loan made at the fixed and uniform rate set down in the tables, might by a rule which distinguished the mode of dealing of the society from that of private capitalists, trustees or executors, be paid off at a time and on a scale different from the uniform rate at which the loan was formerly made, in case a contingency happened which made the borrower desire to pay it off, one contingency expressly mentioned being that which had arisen, viz., the means of repaying the loan; and where the evidence shewed that the plaintiff became a borrower, and made his mortgage in reliance upon the representations made in the circular,—

Held, (affirming the decree of the Court below) that the plaintiff could insist on redeeming his mortgage according to the terms set forth in the circular, such right being sustainable either on the footing of the contract evidenced by the mortgage, the effect of which was to incorporate the rules of the society, while the evidence shewed that what was put forward in the circular as the rule of the society, was one of the rules referred to in the mortgage; or on the footing of a collateral and independant contract.

Held also, that, although the mortgage recited that the mortgagor was a member of the society, having subscribed for eighty-eight shares of the stock, which the society had agreed to pay him in advance on receiving that security therefor, etc, yet without express stipulation to that effect, the mortgagor could not be affected by rules made subsequently to the execution of the mortgage, even if he could under the system under which the operations of the society were carried on be considered a member when he had received the amount of his shares; but that at all events his liability could not be extended beyond the clear words of his contract, which did not point to any but the then existing rules.

Bethune, Q. C., for appellant.

Street, for respondents.

From Chy.] [March 24.

MCCRAE v. WHITE.

Insolvency—Fraudulent preference.

The bill in this case was filed by the assignee in insolvency of one Depew, to set aside a mortgage made by the insolvent to the defendant on Oct. 30th, 1879, in contemplation, as it was said, of insolvency, whereby it was alleged that the defendant obtained an unjust preference over the other creditors.

The insolvency occured on the 21st of following February, nearly four months after the transaction now impeached, thus leaving the onus on the plaintiff.

The defendant was a private banker, who had been in the habit of discounting notes for the insolvent.

The evidence showed that some days prior to the execution of the mortgage impeached, the in

solvent had embarked in a new business, having been intrusted by his new creditors with some $4,000 or $5,000 worth of goods upon a representation that he had no available capital, but that he had experience in business; that he was shortly afterwards threatened with proceedings by a mortgagee of some property of his, which if persisted in, must have closed his business, and that in this emergency he applied to the defendant, who advanced him sufficient to meet the over-due interest, and gave an extension of his own claim, on notes held by him, at a reduced rate of interest: that the defendant intimated to him at the time that he would have to work very carefully.

The evidence also showed that the insolvent was a man of very sanguine temperament.

Held, (over-ruling the decision of the Court below) that the plaintiff had not satisfied the onus which was upon him, of showing that the mortgage was given in contemplation of insolvency, and the evidence leaving the matter in doubt, the complainant must fail, the general presumption of law being in favour of innocence and honesty.

Gibbons, for appellant.

J. H. Macdonald, for respondent.

LAW STUDENTS' DEPARTMENT.

THE OSGOODE LITERARY AND LEGAL SOCIETY.

The 18th public meeting of this society, was held in the new lecture room of the Osgoode Hall on the 7th of March last. The hall was crowded by an intelligent and highly appreciative audience, and the proceedings were of such a nature as to afford them excellent entertainment. Mr. D. B. Read, Q. C., occupied the chair, and associated with him on the platform was Dr. Smith, Q. C. The programme was opened by Mr. A. D. Keen reading Tennyson's new poem "The Scarlet Brigade" in a very pleasing style, and Mr. A. J. W. McMichael read Mark Twain's amusing experience at Niagara Falls. The debate was next in order, and was opened on the affirmative by Mr. A. S. Clark, supported by Mr. Duggan, while the negative of the question was sustained by Messrs. Nelson and Cook. The subject resolved, "that the mental faculties of women were inferior to those of men," proved a very interesting one, and was ably treated in a practical way by both sides. At the conclusion of the debate, the chairman reviewed the subject in a scientific manner, and after commenting upon the arguments, decided that the affirmative had the best of the discussion. Votes of thanks were then tendered to the chairman and Dr. Smith, who replied briefly, and the meeting adjourned.

At the regular meeting of the Society held on the 25th ult., the president, Mr. Isaac Campbell, occupied the chair. Mr. Gerald Bolster contributed to the literary part of the programme by reading a selection entitled "Nothing to Wear." The subject for discussion was whether "a representative should be bound by the will of his constituents." The affirmative of which the question was advocated by Messrs. Cavill and Murray, and the negative by Messrs. Morehead and A. J. W. McMichael. The chairman upon summing up the arguments, explained the position and duties of a representative to his constituents, with regard to the various questions discussed by the legislature, and decided in favour of the negative, and the meeting after transacting some general business adjourned.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Ambiguous acceptances of offers.—*Gibson's Law Notes*, Jan. and Feb

Loss of goods by carriers.—*Irish L. T.*, Feb. 4.

The sales of poisons.—*Ib.*, Feb. 18.

Places within the betting houses act.—*Ib.*, Feb. 25.

Proof of means to pay.—*Central L. J.*, March 4.

Real estate agent.—*Irish L. T.*, March 17.

Innkeepers and their liabilities for the property of their guests.—*Ib.*

Woman as an office-holder and law breaker.—*Albany L. J.*, Feb. 11.

The value of oil paintings.—*Ib.*, Feb. 25.

Recent humorous cases of negligence.—*Ib.*, March 4.

Criminal law decoys.—*Ib.*, March 11.

Severability of insurance.—*Ib.*, March 27.

Use of family names in business.—*Ib.*, March 18.

Comments of a judge upon the evidence.—*Central L. J.*, March 3.

Execution of deeds by agents.—*Ib.*, March 10.

Injury to parental feelings.—*Ib.*, March 24.

FLOTSAM AND JETSAM.

The following paragraph appears in the *Law Times* of last week, under the heading 'Legal News':—

THE BAR AT SHANGHAI.—Advices received at Plymouth from Shanghai report that the Woosung bar, off that place, which has proved the means of destruction of many a ship, is to be dredged out of existence.

Sincere sympathy will be felt with the members of this bar. No doubt their advocacy in shipping cases does not seem to have been very well received, and is even said to have ruined many a good ship; but ignorance of the rule of the road at sea is not uncommon among lawyers, and hardly deserves such summary treatment as dredging out of existence—some form, we greatly fear of keel-hauling.—*Law Journal.*

Law Society of Upper Canada.

OSGOODE HALL.

MICHÆLMAS TERM, 1881.

The following gentlemen were entered on the books of the Society as students:—

GRADUATES.

Alexander George F. Lawrence, Charles Julius Mickle, Herbert McDonald Mowat, George Edward Evans, John Calvin Alguire, Donald McDonald Howard, John Armstrong, David Alexander Givens.

MATRICULANTS OF UNIVERSITIES.

John R Shaw, Lewis Elwood Hambly, Samuel McKeown, John A. McLean, Alonze Edward Swartout, William James Tremcear Frederick George McIntosh, George Francis Burton, James Vance, William Cherry.

JUNIOR CLASS.

Oliver Kelly Frazer, Thomas Reid, Noble Dickey, William Edgar Raney, William H. Sibley, A. M. Taylor, Franklyn Montgomery Gray, Marriott Wilson, Robert Stanley Hayes, John H. Bobier, William Leaper Ross, Samuel H. Bradford, Andrew Dodds, Richard Henry John Pennefather, William Edward Lount, Claude Foster Boulton, William Whittaker, John Wesley Ryerson, Marshall Orla Johnston, John O'Neill, H. D. Folinsbee, Edmund Mc n agu Yarwood, George Albert Jordon, Neil J. Clarke, Albert Edward Beck, Thomas Brown Patton, Frank Morris Gowan, Edgett William Tisdale, William Kenneth Cameron, Charles Henry Brydges, Horace Walpole Bucke, Edward Ernest Louis Pillsworth, John James Smith.

Herbert Dawson was allowed his examination as an Articled Clerk.

The following gentlemen passed their examination and were called to the Bar:

Rufus Shorey Neville, Ernest V. D. Bodwell, William Cayley Hamilton, Edward A. Peck, George William Begyon, John Henry D. Munson, Charles Crosby Going, Thomas Trevor Baines, Frank Marshall McDougall, Alfred Beverley Cox, Archibald James Sinclair, George H. Muirhead, Henry Yale, Sidney Wood, Newenham Parkes Graydon, James Russell, Archibald Stewart, Robert Cassidy, Victor Chisholm, William Humphrey Bennett, Frank Andrew Hilton, George Henry Smith, John Lawrence Dowlin, William Proudfoot, George Miles Lee, Daniel Fraser McWatt, Henry Boucher Weller, Nathaniel Mills; the names are arranged in order of merit.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar:

Edwin Taylour, English Honors and Gold Medal; Adam Johnston, Honor and Silver Medal; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases:—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law:—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

Canada Law Journal.

VOL. XVIII. APRIL 15, 1882. No. 8.

DIARY FOR APRIL.

16. Sun... *1st Sunday after Easter.*
22. Sat.... Beaconsfield Ministry resigned.
23. Sun... *2nd Sunday after Easter.*
24. Mon.. Earl Cuthbert, Gov-General, 1846.
25. Tue... Second Intermediate Examination. Spragge, C., appointed C. Ont., 1881.
26. Wed... Second Intermediate Examination.
27. Thurs. First Intermediate Examination.
28. Fri.... First Intermediate Examination.
30. Sun... *3rd Sunday after Easter.*

TORONTO, APRIL 15, 1882.

MR. GIROUARD'S bill to legalize marriage between a man and the sister of his deceased wife, both as to past and future marriages, has at length passed through the House of Commons No one will be much surprise at seeing it become the law of the land.

WE see from the English papers, that a bill has been introduced into the Imperial House of Commons, to establish a Court of Criminal Appeal. The idea is said to be to allow a prisoner an appeal in all cases when within five days of his sentence he sends a petition to the Home Secretary, accompanied by a certificate from a Queen's Counsel that there are reasonable grounds for appeal. The Court is to be composed of five judges at least, and is to have the power, not only to reserve the sentence, but also to commute the punishment in any way. It is further proposed to give the Court of Appeal power to award compensation in cases of wrongful conviction. We are not advised as to whether the Crown is to be divested to any extent of the prerogative of pardon, but, at any rate, there can be little doubt that the Home Secretary in England, and the Minister of Justice out here, would be among the advocates of a bill intended to relieve them of what must be a most onerous responsibility

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THE presence among the principal performers of the sons of two of the Judges, Mr. J. D. Armour and Mr. W. H. Gwynne, as well as that of Mr. C. McCaul, all three of whom are law students, may be claimed as a sufficient excuse for a reference by us to the recent admirable rendering of Sophocles' "Antigone" at the University of Toronto. Mr. Armour's *Creon* will not soon be forgotten by those who had the pleasure of seeing it, and who were sufficiently familiar with the play to appreciate the merit of his performance and the accuracy with which he had mastered his difficult part. Indeed, though the music and the spectacle may have appealed more forcibly to the greater portion of the audience, not the least remarkable feature of the evening was the correctness with which the Greek text was rendered by the actors, thus showing that the play had been taken up as a matter for serious study, and not as a mere pastime. It may not be too much to say that the whole performance was calculated to give a stimulus of permanent value to scholarly pursuits, and to intellectual cultivation in this country.

WE read in the Revised Statutes of Manitoba cap. 8, sect. 97, the following interesting enactment:—

"Any person using *obscure* language, or being disorderly, or being drunk while on any of the public ferries, shall incur a penalty for each offence not exceeding five dollars, on the com-

plaint of any person within three months from the committing of the offence, and the penalty shall be paid to the use of the Crown."

It is, of course, impossible to anticipate a judicial decision as to what will be held to be the "obscure language" referred to. But we presume that if any gentlemen returning home on any of the public ferries, after dining with his friends, were to observe that the scenery about Winnipeg was "tooral looral," when he should have said "truly rural," he would bring himself within the penalties of the statute, even though the evidence might not suffice to show that he was "disorderly or drunk"; and if any person who had heard the observation should, very properly, lodge a complaint thereof within three months, the offender would be liable to be fined five dollars. The temperance party must be exceedingly strong in the Legislature of Manitoba, when they thus render even the "obscure language" stage penal. It is, however, a little difficult to understand why obscure language on a public ferry should be regarded as any more culpable than obscure language off a public ferry. However, this may be the result of a compromise. It is, of course, very gratifying to know that in a new country generally supposed to contain many characters of questionable respectability, there is no necessity to provide against the use of *obscene* language, so common, unhappily, under like circumstances in other countries.

OUR DIVISION COURTS.

Below we give a few particulars respecting these Courts which may prove interesting to our readers. They are collected from the Inspector's Report for 1880. Out of the forty-two counties and districts we select the only four in which the number of suits entered exceeded 3,000 (exclusive of districts) and the four lowest :—

COUNTY.	No. of Suits Entered.	Judgment Summonses.	Amount of Claims.	Money paid into Court.	Suits under increased jurisdict'n (10 mons)	Jury trials.	Percentage of claims paid into Court.
YORK.....	5,751	1,300	237,900	70,402	463	18	nearly 30
WENTWORTH ..	4,821	127	109,023	44,016	177	2	over 40
WELLINGTON ..	3,421	208	116,303	45,534	148	6	over 39
SIMCOE	3,744	432	115,883	43,251	177	5	over 35
PRESCOTT & RUSSELL.	756	26	21,523	6,131	22	0	over 28
PEEL.....	745	107	24,746	8,971	47	2	over 36
HALTON	684	82	22,814	9,183	31	2	over 40
HALDIMAND....	646	49	22,300	9,377	34	1	over 42

It will be seen from the above that about 36 cents comes into the clerk's hands for every dollar of the claim entered. This, however, can hardly be considered an accurate estimate of the value of the Courts for recovery of claims; for we have not taken into consideration (having no means of doing so), on the one hand, the number of suits settled before trial, or satisfied after judgment without payment into Court; nor, on the other hand, the moneys collected on transcripts from one Court to another.

The disproportion of judgment summonses to the number of suits entered is very noticeable. For instance, in the County of York, their appears to be nearly 4 to 1; while in the County of Wentworth the proportion is 38 to 1. It would be interesting to know how many debtors have been ordered to be committed under the old "91st clause." Every County Judge is now required to make

an annual return of all such, but we have not noticed whether these returns have ever been ordered by the House to be printed.

THE *Legal News*, in speaking of proposed legislation in the Dominion Parliament, characterizes Mr. Charlton's Bill to provide for the punishment of adultery, seduction and such like offences as "Charlatanism." We are not prepared to say whether the details of the proposed measure are the best, but he must be either a very ignorant person or a very heartless libertine who could pooh-pooh in such an airy manner one of the crying evils of the day. The subject is, of course a most difficult one, but there is one monstrous wrong in the present state of things—the disproportion of punishment. Let us suppose for a moment a case of seduction, and that both parties are equally guilty, though not a fact in the immense majority of cases. The man practically goes unpunished; he is scarcely tabooed in society; in fact, his companions think him rather a fine fellow, instead of denouncing him as a cowardly blackguard; while the unfortunate woman bears the whole burden, becomes an outcast, is driven from home, disgraced and ruined, to bear her trial alone, over-whelmed by an agony of shame, that too often ends in some hideous crime or piteous suicide. We are not going to argue as to who is most to blame, but what we insist on is, that *if* seduction is an offence, there should be some equality of punishment, and for this simple reason, that without some fear of adequate or proportionate punishment there is with the majority of men no way of compelling them to pause before being parties to a terrible wrong. If some of our legislators and those who assume to direct public thought even from a legal stand-point, were to spend a few hours in some of our reformatories and havens for fallen women, infants' homes, Magdalen asylums, police cells, or city morgues, they would not talk or write as they do. Some of our judges, viewing the subject only from the stand point of seduction cases brought before them by those, who, as a rule, are *not* the class that require protection, have, by their remarks in Court, helped to lead astray public thought on this matter. Men who attempt to gain their ends by force are very properly given a dose of the "cat;" let some of those who succeed in gratifying their selfish passion by heartless lies and seductive arts (reduced by some to a system) be touched up by the same implement, and we venture to predict an enforced virtue which will vastly mitigate the present aggregate of human misery. Lust in the heart is said to be a transgression of the Divine law; lust put into action and the purpose accomplished by force is a crime. Fraud and deceit are, under certain circumstances, recognised by the law as criminal. Surely, therefore, lust put into action and the purpose accomplished by fraud or deceit, should also be a crime, and especially so when there is a consequent grievous personal injury to the injured party. There is of course difficulty in this matter, as in others, difficulties as to evidence and danger of black-mailing, nor are we advocates for the impossible task of making men good by Act of Parliament and others besides, but all this does not affect the principal involved. The present state of the law of seduction in England and Canada is not only a disgrace to humanity, but causes a financial burden to the country and to charitable citizens. We trust good may result from the move made by Mr. Charlton.

ADMINISTRATION OF JUSTICE IN BRITISH COLUMBIA.

(Continued from page 130.)

In our last article on this subject we referred to the points that arose in the *Thrasher Case*. After very full argument the Judges' on the 10th February, delivered three separate,

elaborate and voluminous judgments, the Judges arriving at the same conclusions though by different roads.

The points decided may be summed up as follows:—

The Provincial Legislature had by a Local Act, 1881, chapter 1, sections 28, 32, declared that the sittings of the Supreme Court for reviewing *nisi prius* decisions, motions for new trials, etc., should be held only once in each year, and on such day as should be fixed by rules of Court, and that the Lieutenant-Governor-in-Council should have power to make rules of Court.

Held, by Sir Matt. Baillie Begbie, C. J., and Crease and Gray, Justices, (McCreight, J., being absent,)

1. That the appointment of the days on which the Court should sit for such purposes is a matter of procedure, and of purely judicial cognizance, and is not within the power of the Local Legislature either to fix by positive enactment, or to hand over to be fixed by any other person or persons, but belongs to the Court itself; and that the above sections are in that respect unconstitutional and void.

2. The power conferred by section 92 of the British North America Act on Provincial Legislatures is a legislative power, enabling them to exercise legislative functions merely, and does not enable them to interfere with functions essentially belonging to the Judiciary or to the Executive.

3. The Judges of the Supreme Court of British Columbia are officers of Canada, and by sections 129, 130, their power and jurisdiction remain as before Confederation, subject only to the constitutional action of the Parliament of Canada under the British North America Act, 1867.

4. The authority given by section 92, subsection 14, to the Local Legislature to make laws in relation to civil procedure, is confined to civil procedure in the Courts described in that sub-section, and the Supreme Court of British Columbia does not come within the meaning of that sub section. The power to make laws in relation to criminal procedure in those Courts, *i. e.*, the Provincial Courts described in that sub-section, and as to all procedure in all other Courts is, either by the general or the particular words of section 91, reserved to the Parliament of Canada.

5. The Local Legislature has no power to diminish or repeal the powers, authorities or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office by the Judges, whether as to residence or otherwise.

The Judges have, since giving the judgment above noted, under the B. C. Act of 1869, sect. 3, and their Common Law rights, made rules for practice and procedure the same as the Supreme Court Rules, 1880, which are working well and satisfactory. The judges, have also issued a general order establishing the same Judicature Rules, (the Supreme Court Rules, 1880), which they had already made their own, and as to these see *post* p. 168.

The local bar, it is said, concur in the result and uphold the above judgment; and legal matters in the Supreme Court are going along more smoothly and harmoniously than they have done for some time. The Judicature practice is resumed. A case can be tried to-day at Nisi Prius, and if the judges be disengaged, reviewed and corrected the next day.

Another set of constitutional questions have cropped up in B. C. in another case—that of *Reg.* v. *Vieux Violard*, and raised also in the *Thrasher Case* by Mr. Theodore Davie. The Province passed an Act called the "Judicial Districts Act, 1879," for districting their Supreme Court Judges and compelling them, or such of them as it chooses, to reside in remote districts as Cariboo or Kamloops, and also in New Westminster. Their Supreme Court Commissions, some signed by the

Queen hereself, run over the whole Province and in every branch of judicature, but this local Act affects to empower the Governor-General in Council to confine them to particular local districts, where (Act of 1878) they would be expected to preside over monthly County or Division Courts, in which there are no pleadings, and the proceedings are conducted by non-professional men, to hear appeals from magistrates courts, and to preside daily in gold Commissioners Courts, so that in criminal cases the Crown prosecutor would be able to select the particular judge he might desire to try any given case, whilst a prisoner could not.

In spite, it is said, of the repeated protests of the judges, an Order in Council has been issued directing a certain Supreme Court Judge to reside in the gold bearing mountain range of Cariboo, another in the bunch grass solitudes of Kamloops, another at New Westminster Judicial District, and the remaining two to confine themselves to Victoria.

It is satisfactory on a review of the whole matter to have our minds disabused of an impression that instead of obstructing the channels of justice, the B. C. Judges have been persistently throwing down the barriers and opening the gates of the Temple of Themis to all whose necessities compel them to pay homage at her shrine.

A letter from a correspondent in British Columbia, with some further explanations as to the matters above spoken of, appears in another place.

RECENT ENGLISH DECISIONS.

Proceeding with the March numbers of the Law Reports, and with 8 Q. B. D., from the point at which we left off on April 1st, the case of *ex parte Edwards*, p. 262, involves two points which may be briefly stated, viz. :

TOWN AGENT OF COUNTRY SOLICITOR.

(i.) A solicitor who, acting as town agent for a country solicitor, has recovered a sum of money on a judgment obtained in an action, cannot refuse to pay over the same merely because the country solicitor is in his debt, unless the country solicitor had a lien upon it for a greater amount; (ii.) if he does so refuse the Court can, on the application of the client of the country solicitor, exercise its summary jurisdiction over its own officers and order the town agent to pay over the amount, and this though no fraud be imputed to the town agent.

INDICTMENT—INFORMATION.

The next case, *Reg.* v. *Slator*, p. 267, interprets a statutory enactment which we have not got, and the judges were called upon to construe the word "indictment." Bowen, J., says—"The distinction between an indictment and an information is one founded in the history of the law and liberties of this country. There are two great ways of proceeding against and bringing to trial a person accused of a crime; one is by proceeding against him before a grand jury, and time out of mind that proceeding has been known as an "indictment;" the other mode is by proceeding without a grand jury upon an information, which is instituted by the law officers of the Crown or by private prosecutor with the leave of the Court."

CHEQUE—DELAY IN PRESENTMENT.

We can now proceed to *The London and County Banking Co.* v. *Groome*, p. 288. This was an action by the bearers against the drawer of a cheque payable to bearer, alleging due presentment, dishonor and notice of dishonor. The plaintiffs, it appeared, took the cheque eight days after its date, and the question before Field, J., was—in his own words—whether "the well-established rule of law, as applicable to overdue bills of exchange and promissory notes, that those who take them take them at their peril, and stand in no better position than those from whom they take them as to any equities between the latter and the acceptor or maker attaching to the instrument," applied also in the case of cheques. The learned Judge held, on the

authorities, that it did not. He says: "The reason of the rule is, that, inasmuch as these instruments (*i.e.* bills and notes) are usually current only during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that, as a rule of law, the indorsee must take it on the credit of and stand in no better position than the indorser. But, with regard to cheques, no such rule has been laid down; and there is more than one case in which that proposition has been denied or doubted." He then reviews the cases, arriving at the conclusion that the real question was whether the cheque was taken by the plaintiffs under such circumstances as ought to have excited their suspicion, and the lapse of eight days was, although not conclusive, a circumstance to be taken into consideration in coming to a conclusion on that question.

STATUTE OF LIMITATIONS—FRAUD—JUDICATURE ACT.

The next case, *Gibbs* v. *Guild*, p. 296, raised an important question as to the operation of the Statute of Limitations, in bar of an action in which the plaintiff claimed damages for fraudulent representations made by the defendant more than six years before the commencement of the action, and also claimed to exclude the application of the statute by reason of the non-discovery by the plaintiff of the fraud within the period of limitation, such non-discovery having been induced, as he alleged, by the active concealment of the fraud by the defendant from the plaintiff, who could not by exercise of reasonable diligence have discovered it. Field, J., held that it was unnecessary to decide how the matter would have stood if his jurisdiction had been limited to that of a court of law; for by sect. 24 of Jud. Act, 1878, (Ont. Jud. Act, section 16,) he was in a case like that before him, bound to give the plaintiff the same relief as ought to have been given to him by the Court of Chancery in a suit instituted for the same or like purpose, and, in the Court of Chancery, the authorities in such a case had been uniform for nearly two hundred years, and the conclusion to be derived from them was, "that concealed fraud and absence of reasonable means of discovery, if pleaded, will prevent the application of the statute."

MARINE INSURANCE—"FREE FROM CAPTURE OR SEIZURE."

Of the last case in this number, *Cory* v. *Burr*, p, 313, it is sufficient to say that the question raised was whether, where, during the continuance of a policy of marine insurance, the ship was seized and detained for smuggling, in consequence of the barratrous act of the master,—the loss was to be treated as a loss by barratry of the master, in which case it was within the assurance effected by the policy, and so recoverable, or whether it was a loss by capture and seizure, and so within the warranty contained in the policy, whereby the subject matter of insurance was warranted "free from capture and seizure." The Court held that although the case of loss by barratry does not fall within the general rule applicable to losses by perils assured against, viz., that when in the chain of causes the loss may be referred to more than one of these perils, it should be assigned to its proximate and not to its remote cause—yet the authorities in cases where, as in the one before the Court, there was a warranty against the proximate cause of loss, *i. e.* the capture and seizure, and the application of the well known principle that a contract of insurance is one of indemnity, and indemnity only, lead to the conclusion that the loss in the case before the Court was imputable to the excepted peril.

We can now proceed to the March number of L. R., 19 Ch. D., comprising p. 207-310.

EQUITABLE TITLES—LEGAL ESTATE—PRIORITY.

In the first case, *Harpham* v. *Shacklock*, the Court of Appeal decided that where S. had received money from the plaintiff for the purpose of being invested on a mortgage of a certain specified property, and misappro-

priated the money so received, but afterwards took a security on the said property in his own name. (i) S. was a trustee of that security for the plaintiff to the extent of the money received from him; (ii) this equitable title in favour of S. must prevail against a subsequent deposit of the said security made by S with B.; (iii) B. did not acquire priority over the plaintiff by having got in the legal estate after receiving notice of a prior incumbrance, for "nothing is better settled than that you cannot make use of the doctrine ot *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim."

APPEAL FROM ORDER MADE ON DEFAULT IN APPEARING.

Of the next case, *ex parte Streeter*, p. 216, it seems only necessary to say that it was an interpleader matter and in it an objection was raised that a person against whom an order had been made on his default in appearing, could not appeal from the order, and *Walker* v. *Budden*, L. R. 5 Q. B. D. 267, was cited in support. Jessel, M. R., however, said that that case does not support the objection: and you are still entitled to appeal on the ground that the adverse claimant did not make out his title.

PRACTICE—EVIDENCE DE BENE ESSE IN OLD SUIT.

In *Llanover* v. *Homfray*, p. 224, the question arose whether evidence which had been taken de bene esse in an old suit, between persons privy in estate to the persons in the present action, and in which the question at issue was the same, was admissible. The Court of Appeal held that it was. Jessel, M. R., said: "If the witnesses were now alive, of course their evidence could not be read, but they must be called. There is, in my opinion, no more objection to reading this evidence than there is in any other case where the witnesses have been called and are dead. If a witness gave evidence at the trial of an action, and a new trial was ordered, then if he were dead at the time of the new trial, you could read his former evidence; but if he were alive you could not do so, but would have to call him again."

SPECIFIC PERFORMANCE—AGREEMENT TO LEASE.

The next case, *Marshall* v. *Berridge*, p. 233, contains the decision of the Court of Appeal on the point whether there can be specific performance of an agreement for a lease, when it does not appear within the four corners of the agreement at what period the lease is to commence. Fry, J., held that there could be, since such an agreement amounted to an agreement for a lease to commence *from the date of the agreement*. The Court of Appeal however, over-ruled this decision, holding that the parties, when they enter into an agreement not operating as a present demise, intend a lease to be prepared which *prima facie* will be dated on a subsequent day,—and, as Lush J. J. says, p. 244, "It is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain these elements. (ii). A subsidiary point arose in the case, which is alluded to by Jessel, M. R. The plaintiff succeeded in the Court below by inducing the Court to put upon the memorandum of agreement an interpretation which he had always repudiated, inasmuch as he induced the Court to treat the contract as a concluded one, whereas in his previous communications with the defendant, he had maintained it was conditional only, and had never signified to the defendant that this condition had been complied with. On appeal the M. R. says, p. 241,—"It would be a very singular thing that a man who had always insisted on one construction of the agreement, and had refused to take possession because that was its proper construction, should then come to a Court of Equity, insisting that the construction for which he had hitherto con-

tended was wrong, and that the agreement had a totally different meaning, and should ask the Court to attach that meaning to it, and grant on that footing specific performance, the granting of which is in the discretion of the Court."

COVENANT.

In *Nicoll* v. *Fenning*, p. 258, the vendors of a certain portion of an estate of twenty-five acres covenanted with the vendee, C., that they, "their heirs and assigns, should not thereafter sell or convey any portion of the estate without requiring the purchaser to enter into a covenant with them not to allow any building to be erected thereon to be used as a public house, tavern or beer shop." Afterwards further portions of the estate were sold, the various purchasers being required to covenant not to use, or permit to be used, any building on the premises assigned as a tavern, public house or beer shop. The action was brought by the assignee of the first vendee, C., to restrain one of the subsequent purchasers of a portion of the estate, and a yearly tenant of the said purchaser, from using a building on the estate as a beer shop. Bacon, V. C., granted an injunction and an enquiry as to damages. He said, referring to the first covenant: "Every person to whom they (the vendors) afterwards sold was entitled to the benefit of that covenant. * * * From that date the rest of the property was subject to that restriction; and from that date it was not competent for the vendors in equity to dispose of that property, unless they protected not only C. but all the rest of the owners of the property, from the inconvenience of having any other public house or beershop than that for which C. held a lease. * * * Was it capable of argument in a Court of Equity that the persons who claimed the benefit of that covenant were precluded from suing to prevent its breach by a person who knew when he bought that he bought subject to that restriction? * * * The functions of a Court of Equity are to prevent the commission of frauds of any sort, and it is the duty of the Court to suppress chiccanery or ingenious devices for the purpose of evading a plain distinct obligation. * * * All the plaintiff asks in this case is to be put in the same position as if the covenant had been made by the defendant directly with him. But whoever else might have sued at law, in enforcing the contract, he would be at best but a trustee of the covenant for the benefit of the plaintiff, who had a right to the benefit of it."

PATENT—PRIOR USE IN COLONY.

In *Rolls* v. *Isaacs*, p. 268, Bacon, V.C., had to decide whether the prior public use in Natal, a British Colony, having power to grant its own letters patent, invalidated letters patent granted in England licensing the use of a certain invention in the United Kingdom. He held that it did not. Counsel, impeaching the patent, argued that there was a proviso making void the patent if it should appear to the Crown that the petitioner "is not the first and true inventor thereof within this realm as aforesaid," and that therefore the petitioner shall be the first and true inventor in all parts of the realm. The learned V.C., however, held that "inasmuch as there are in Natal the means of granting patents within that realm (if it is to be called by that name) if the Queen of England grants a patent for the exercise of an invention in this realm," (the United Kingdom,) "and the thing be a new invention in this realm, the fact of its having been practised previously in Natal cannot affect the power of the Crown to grant to the petitioner the right to exercise the invention which he for the first time communicates to the people of this realm."

TRUSTS—RESTRAINT ON ANTICIPATION.

In the next case, *in re Benton*, p. 277, a testatrix left her real and personal estate to trustees on trust to sell, and the trustees were directed to invest and stand possessed of the proceeds upon trust for the sons and daughters in equal shares, those to the latter

to be for their sole and separate use without power of anticipation, with power to the trustees to revoke the trusts as regards any daughter on marriage as they should see fit. The question before the Court was whether the trustees could pay the married daughters, upon their separate receipt, their shares in the proceeds of the mixed residue, which at this time consisted of a sum of £700 and three leasehold houses. It was argued that the restraint upon anticipation did not apply to an uninvested sum of money. Bacon, V.C., however, held that they could not, for that "it was their duty in carrying out the trust to see that this fund bore interest, and therefore this was an income-producing fund and subject to the restraint upon anticipation just as much as any other part of the testatrix's estate."

RIGHT OF SUPPORT FROM BUILDING—PRINCIPAL AND AGENT.

In *Lemaitre* v. *Davis*, p. 281, the celebrated case of *Dalton* v. *Angus*, L. R., 6 App. Cas. 740, noted at length in our number for Jan. 1st, ult., was a good deal referred to, and three points arose which require notice: (i.) The first was—whether support can be claimed in law from one building by the owner of another building—supposing that the two buildings adjoin each other—the one building being at the extremity of one owner's land, and the other building being at the extremity of the other owner's land, and supposing that either of them received support and that there was an alteration in the structure in any way? The learned Judge, Hall, V. C., held that, though there was nothing in *Dalton* v. *Angus* which conclusively settles the point, yet there was no reason why if there be a right of support against land, there should not be against a building; and he held, moreover, that it is a right within the scope and provisions of, and claimable under, sect. 2 of Imp. Prescription Act: (R. S. O. c. 108, sect. 25). (ii.) The second point arose from the contention of the defendants that any such right must be obtained openly, not under such circumstances of secrecy as they alleged existed here. Both tenements in this case were ancient, more than sixty years old, and the V. C. said, as to this point: "In a state of things, where the origin of these two buildings goes so far back, it is very difficult to deal with the case, it being almost impossible to prove anything, on the one hand or the other, affirmatively; therefore the conclusion which I come to is that the enjoyment would not be of right if it was *clam*, but I think the evidence shows that the right was open—that each proprietor of the two tenements knew of the existence of the neighbour's cellar; therefore, as a matter of fact, I hold, so far as it may be necessary, that the enjoyment of the right has not been *clam*, or otherwise than open; an open enjoyment within the meaning of the Act. (iii.) The third point was as to whether the employer was liable as well as the contractor, the damage having been done by the latter in carrying out a building contract? The learned V. C., applying the principles laid down in *Dalton* v. *Angus*, held both were liable. "It would be a strange thing," he said, "if principals should be allowed to escape from liability when altering their premises, and erecting new buildings, by saying that they employed contractors under the specifications which were drawn for their guidance, and that the contractors only were liable for any injury which might happen."

ANNUITIES—PERPETUITIES.

The next case, *Blight* v. *Hartnoll*, p. 294, involved two points, one being as to the construction of a bequest of annuities; the second relating to the application of the rule against perpetuities to the will in question; and the third to the exercise of a power of appointment. (i.) The testatrix bequeathed an annuity payable out of the rental and certain hereditaments to A. for life, and after A.'s decease to B. for life, and if B. should die before the end of the term during which the rental was payable, the executors were to

pay the annuity out of the rental "to the surviving children of B. in equal shares and proportions," and after payment of the annuity the surplus income was to be accumulated as therein mentioned. The question was whether B.'s children took the annuity for life or in perpetuity, or for the duration of the leases of the said hereditaments, which were still continuing. Fry, J., held (a) that notwithstanding *Evans* v. *Walker*, L. R. 3 Ch. D. 211, the mere want of limitation in the last gift of the annuity does not import that the annuitant is to take anything, for "the duration of the life of the first taker is expressed not for the purpose of limiting the gift to the first taker, but of limiting the commencement of the gift to the second or successive takers, and therefore the principle of *expressio unius est exclusio alterius* does not apply;" (b) the present case did not come within the rule of those in which the Court had come to the conclusion that the gift was not really that of an annuitant, but the gift to a person of the income arising from a particular fund without limit, and when the Court, therefore, held that the unlimited gift of the income was a gift of the *corpus* from which the income arose. For, said he, "What I understand by the appropriation of a fund for the purpose of the rule in question is the setting aside a sum of money or property to meet the particular gift, and to meet nothing more. *There being a complete application of the residue in this case*, it seems to me impossible to say that this is an appropriation of the fund." (c.) Although the testatrix spoke of "the said annuity," she spoke of it as a thing which it was necessary for her to direct to be continued after the life of each taker—words which rather imported that she considered the annuity only for life unless she expressed the contrary. (ii.) The point decided with reference to perpetuities was, in the words of the learned Judge, as follows: "The rule against perpetuities requires, in my view, the ascertainment within the period not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the rule is aimed at the practical object of telling who can deal with the property, and if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up." (iii.) The point decided with reference to appointments is an interesting one. A power of appointment was given in the will among certain persons living after the happening of a certain event. The donee of the power assumed to exercise the power before the happening of the event in question. Fry, J., held the appointment invalid. "I think," he says, "that where a power of appointment, amongst a class of people, is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the pesrons are not known."

PARTITION ACTION—CONVERSION.

In *Mordaunt* v. *Benwell*, p. 303, the question arose whether one who suceeeds as heir-at-law to a share of the proceeds in Court of real estate sold under a decree in a partition action, takes it as money or real estate. Fry, J., held that, though by the Imperial Acts (cf. R. S. O. c. 40, sect. 82) the share of the proceeds in Court remained real estate for the purpose of succession, yet the heir-at-law took it as money, and as between *his* real and personal representatives it must go as money.

MAINTENANCE BEYOND PROVISION IN WILL.

Of the last case in this number, *in re Colgan*, p. 305, it seems only necessary to say that on somewhat the same principle as that followed in *Havelock* v. *Havelock*, L. R. 17 Ch. D. 807, noted 17 C.L.J. 425, Fry, J., ordered an allowance for the maintenance and education of certain infant beneficiaries under a will, in excess of the provision made therefor by

the will, the interest of third parties, however, being carefully protected.

This complete the March number of the Law Reports, and brings our review up to date, and we may hope shortly to be able to take up the LAW JOURNAL Reports for the current year, so as to notice such cases as have not been reported in the Law Reports.

CANADIAN CASES BEFORE PRIVY COUNCIL.

The English *Law Times* publishes the following short *resume* of the decisions which have been given by the Judicial Committee of the Privy Council, in cases where questions as to the powers of Provincial Legislatures under the British North America Act have come before it. The working out of our complex constitution, is undoubtedly full of instruction to students of politics everywhere. The article is published under the title of "Powers of Provincial Legislatures," and is as follows:—

"The case of *The Citizens' Insurance Company of Canada* v. *Parsons* (45 L. T. N. S. 721) raises again a question which has been several times discussed by the Judicial Committee—namely, the distribution of legislative power between the Parliament of Canada and the legislatures of the various provinces comprised in the Dominion; and at the present time the practical working of such a constitution as that of Canada is not without interest and instruction both for lawyers and politicians, in reference to possible proposals for the extension of the principle of local self-govern ment in the United Kingdom.

The matter is provided for by sects. 91 to 95 of the British North America Act of 1867 (30 Vict., c. 3), by which the Dominion of Canada was created. The scheme of this legislation is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within such classes of subjects as are assigned exclusively to the Provincial Legislatures; but "for greater certainty but not so as to restrict the generality of the foregoing terms of this section," sect. 91 assigns to the Dominion Parliament exclusive authority in twenty-nine enumerated classes of subjects, and concludes as follows:—"Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." Similarly sect. 92 gives to the provincial Legislatures exclusive power to make laws in relation to sixteen enumerated classes of subjects.

It must, however, have been foreseen that no sharp and definite line had been or could be drawn, and the words of sect. 91 seem to endeavour to provide for the case of an apparent conflict. The fact, however, that the question has been raised in as many as six different appeals before the Judicial Committee, and that in two of them the decisions of the courts below were reversed, shows the matter is not left free from doubt. In the first case (*L' Union St. Jacques de Montreal* v. *Belisle*, L. Rep. 6 P. C. 31; 31 L. T. Rep. N. S. 111) it was held that an Act of a provincial Legislature, passed to relieve a benefit society which was in a state of financial embarrassment, related to "a matter merely of a local or private nature in the province," within sect. 92 of the Act, and not to "bankruptcy and insolvency," within sect. 91, and was therefore not *ultra vires*. Similarly in *Dow* v. *Black* (L. Rep. 6 P. C. 272; 32 L. T. Rep. N. S. 274) an Act empowering the majority of the inhabitants of a parish to raise, by local taxation, a subsidy for the promotion of the construction of a railway already authorised by statute, was held to relate to a local matter within the province, though the railway was intended to extend beyond the province, and "railways extending beyond the limits of the province" are expressly excepted from the control of the Provincial Legislatures. In both these cases the courts below had taken the opposite view.

The case of *The Attorney-General for Quebec* v. *The Queen Insurance Company* (3 App. Cas. 1090; 38 L. T. Rep. N. S. 897) decided that the imposition of a stamp duty on policies of assurance, renewals and receipts, was not "direct taxation within the province," and was *ultra vires*.

In *Valin* v. *Langlois* (5 App. Cas. 115; 41 L. T. Rep. N. S. 662) leave to appeal was refused on petition, on the ground that "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts," which was reserved to the Provincial Legislature, did not relate to election petitions.

In *Cushing* v. *Dupuy* (5 App. Cas. 409; 42 L. T. Rep. N. S. 445) it was decided that sect. 91, by reserving to the Dominion Parliament questions of "bankruptcy and insolvency," give power to interfere to that extent with "property and civil rights in the province," though sect. 92 assigned them to the Provincial Legislature. But in the last case (*The Citizens' Insurance Company* v. *Parsons*) referred to above, the Judicial Committee held that those words covered a provincial statute "to secure uniform con-

ditions in policies of fire insurance," notwithstanding that the Dominion Parliament has exclusive powers for "the regulation of trade and commerce," and that such a power did not include the regulation of the contracts of a particular business in a single province.

The above series of decisions are sufficient to show the many difficulties and pitfalls which must in practice attend the working out of any such scheme of divided legislation."

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

DARRANT v. RICKETTS.

Imp. O. 14, *r.* 1—*Ont. Rule No.* 80.

An order cannot be obtained under the above rule against a married woman in an action for the price of goods supplied to her during coverture, inasmuch as there can be no judgment against a married woman personally in respect of such a claim.

[Jan. 12.—Q.B.D., L. R. 8 Q.B.D. 177.

Lumley Smith, Q.C., for defendant:—There was never in equity, nor is there now at law, any judgment against the married woman personally in respect of a liability contracted during coverture. The practice is to order an inquiry as to the existence of separate estate chargeable with the sum claimed, and to declare that such separate estate, if any, is chargeable therewith; *Picard* v. *Hine*, L. R. 5 Ch. 274; *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454.

FIELD, J.:—It is clear that the order as at present framed cannot stand; there must have been some misapprehension on the part of the Judge at Chambers as to the form of the order applied for.

We will give the plaintiff an order in the form in accordance with the decision in *Pike* v. *Fitzgibbon*, as we understand that there is no real dispute between the parties as to the claim, but the plaintiff must pay the costs of the application in this Court and at Chambers.

[NOTE.—*Counsel for the defendant said nothing in opposition to the variation of the order as suggested. The Imp. and Ont. rules are not identical, though apparently virtually so.*

HARPHAM v. SHACKLOCK.

Imp. Jud. Act, 1873, s. 49—*Ont. Jud. Act*, *s.* 32—*Appeal—Costs only.*

[Nov. 18.—C. of A., L. R. 19 Ch. D. 215.

This was a suit to settle priorities between incumbrancers. In the Court below Malins, V.C., after settling the priorities, ordered B., one of the defendants, to pay the costs of the plaintiff and of his co-defendant. B. appealed from the decision as to priorities, but the decision of Malins, V.C., was confirmed. B. then asked the Court to vary the order as to costs, as being without precedent in a priority suit, where no misconduct was alleged.

JESSEL, M.R.:—I look upon the order with some surprise. It is certainly the general rule that in a priority suit the costs follow the mortgages, but the Court has a discretion, and can order one or other of the claimants to pay the costs if a case is made for it. If we were to vary the order of the Court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs. I do not think that such is the case here, for I believe this to be a *bona fide* appeal on the merits; but we ought not to depart from the general rule.

BAGGALLAY, L.J.:—I also have no doubt about the *bona fide* character of this appeal, but we must follow the rule that there shall be no appeal upon the question of costs only.

[NOTE.—*The Imp. and Ont. sections are identical.*]

COOPER v. VESEY.

Imp. Jud. Act, 1873, *sect.* 16—*Ont. Jud. Act*, *sect.* 9.

[Nov. 30.—Ch. D., 51 L. J. N. S. 149

Where a person, fraudulently personating a deceased testator, had forged instruments purporting to be legal mortgages of property of the said testator in favour of mortgagees, without notice, KAY, J., *held* that in an action brought for the purpose of obtaining a declaration that the mortgages were void against the persons claiming under the will, and to have the title deeds delivered up, he was bound by the above section to order the title deeds to be given up by the mortgagees, and could not leave the plaintiffs to their legal remedy as to the deeds.

He had first held that under the circumstances, the mortgages must be declared void as between the persons claiming under the will and the mortgagees.

As to the second point he said :—"For these reasons I think the mortgagees could have no claim to the deeds, even in equity, but I am rightly reminded that I am not administering equity only. The third paragraph of the prayer asks for delivery up of these deeds. If there could be any ground for the defendants urging a Court of Equity to leave the plaintiffs to their legal remedy as to the deeds, I am to give that legal remedy also. I must, therefore, order that the title deeds be delivered up."

[NOTE.—*The Imp. and Ont. enactments appear mut. mut. virtually identical.*]

THE HELENSLEA.

Imp. O. 11. *r.* 3—*Ont. Rule No.* 7—*Writ of Summons.*

A writ of summons will not be set aside, merely because the defendant has been falsely described therein as resident within the jurisdiction, whereas, in fact, he resided out of it.

[Jan. 24.—Adm. 51 L. J. N. S. 16.

The application was to set aside a writ *in personam* in an action for collision.

SIR R. J. PHILLIMORE.—I cannot acceed to this motion. The writ was not, it appears, issued with any intention of serving it out of the jurisdiction of the High Court; and when I look at the form of the writ, I find there is nothing on the face of it which can be said to make it invalid. There is no reason why the plaintiffs should not wait until the defendant comes within the territorial jurisdiction of the Court, though at the time when the writ was issued he was not resident in the city of London, and though he has been erroneously so described. The motion must be dismissed with costs.

[NOTE.—*The Imp. and Ont. rules appear virtually identical.*]

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

From P. E. Island.] [March 28.

HOLMAN v. GREEN.

Letters Patent under Great Seal, P. E. I., of foreshore in Summerside Harbour—B. N. A. Act, sec. 108—*Public Harbours*—25 *Vict., ch.* 19, *P. E. I.*

This was appeal from a judgment of the Supreme Court of Prince Edward Island, making absolute a rule for a non-suit, in an action of ejectment brought to recover a portion of the foreshore of Summerside Harbour The plaintiff's title consisted of Letters Patent, under the Great Seal of Prince Edward Island, dated 30th August, 1877, by which the Crown, in right of the Island and assuming to act in exercise of authority conferred by a Provincial Statute, 25 Vict., ch. 19, purported to grant to the plaintiff, in fee simple, the land sought to be recovered in this action.

Held, that under section 108, B. N. A. Act, the solid bed of the foreshore in the Harbour of Summerside belongs to the Crown as representing the Dominion of Canada, and therefore the grant, under the Great Seal of Prince Edward Island, to plaintiff, is void and inoperative.

Davies, Q.C., for appellant.

Peters, for respondent.

Appeal dismissed with costs

From Nova Scotia.] [March 28.

CREIGHTON v. CHITTICK ET AL.

Insolvent Act of 1877, *sec.* 144—*Trader—Pleadings.*

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making the rule nisi, taken out by the respondents, absolute to set aside the verdict for plaintiff, and enter judgment for the defendants. This action was brought by the plaintiff, as assignee of L. P. Fairbanks, under the Insolvent Act of 1875, for several trespases alleged to have been committed on the property known as the Shubernacadie Canal property, and for conversion,

by the defendants, to their own use of ice taken off the lakes through which the canal was intended to run.

The declaration contained six counts, the plaintiff claiming as assignee of Fairbanks. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said Creighton was not nor is such assignee as alleged."

After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the Court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the Court should have power to enter judgment for or against the defendant without costs, a rule nisi for a new trial to be granted accordingly and filed.

The following rule was taken out: "On reading the minutes of the learned Judge who tried this cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent, subject to, etc., be set aside with costs, and a new trial granted, etc."

This rule was made absolute in the following terms: "On argument, etc., it is ordered that the said rule nisi be made absolute with costs, and judgment be entered for the defendants against the plaintiff with costs." Thereupon the plaintiff appealed to the Supreme Court of Canada, and it was

Held, that by traversing, the plaintiff, as assignee the defendants, put in issue the fact implied in the averment that the plaintiff was assignee in insolvency, that Fairbanks was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that Fairbanks bought or sold in the course of any trade or business, or got his livelihood from buying or selling, that the plaintiff failed to prove this issue.

Appeal dismissed with costs, but the rule appealed from varied and made absolute for a new trial.

Per GWYNNE, J.:—That assuming Fairbanks to be a trader still, the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the Court to render a verdict plaintiff or defendants, accordingly as they should consider either party successful upon the law and the facts; that the Court having exercised the jurisdiction conferred upon them by this agreement, and rendered judgment for the defendants, this Court was also bound to give judgment on the merits, and, as the judgment of the Court below, in favor of the defendants, was substantially correct, to sustain it; and it having been objected that as the rule nisi asked for a new trial, the rule absolute in favor of the defendants was erroneous, that such an objection is too technical to be allowed to prevail, and that the rule nisi having, as it did, recited the agreement at *nisi prius*, and the Court below having rendered a verdict for the defendants, it should not be varied, as to order a new trial would be but to protract a useless litigation at great expense.

Thompson, Q.C., for appellant.

Rigby, Q.C., for respondent.

Appeal dismissed with costs.

ROSS v. HUNTER.

Trespass — Easement — Registration — Notice — Rev. Stat. N. S., 4th series, c. 79, secs. 9 and 19.

This was an action brought by appellant against the respondent for having erected a brick wall over and upon the upper part of the south wall or cornice of plaintiff's store, pierced holes, &c. To that respondent pleaded, besides not guilty and not possessed, special pleas to the effect that he had done the acts complained of for a valuable consideration. In the Supreme Court, by permission of the Court, an added replication was filed setting up the provisions of the Registry Act, and the defendant pleaded an equitable rejoinder, alleging that plaintiff and those through whom he claimed, had notice of the defendant's title to the easement at the time they obtained their conveyance. In 1859, one Caldwell, who then owned appellant's property, granted by deed to respondent the privilege of piercing the south wall, carrying his stove pipes into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building which was higher than plaintiff's (appellant). The appellant in 1872, purchased the property from the Bank of Nova Scotia, who got it from one Forman, to whom Caldwell had conveyed it. All these conveyances being for valuable considera-

tion. The deed from Caldwell to respondent was not recorded until 1871, and appellant's solicitor, in searching the title, did not search under Caldwell's name after the registry of the deed by which the title passed out of Caldwell in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence, when one's attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen.

Held, (GWYNNE, J., dissenting), that the continuance of illegal burdens on the plaintiff's property since the fee had been acquired by him, were in law fresh and distinct trespasses against the plaintiff for which he was entitled to recover damages unless he was bound by the license or grant of Caldwell.

2. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registry Act, 4 Series Rev. Stat. N. S., ch. 79, secs. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance from Caldwell for valuable consideration, and therefore from the date of the registration of the conveyance to Forman, the deed of grant to respondent became void at law against Forman and all those claiming title through him.

3. That there was no actual notice given to the appellant such as to disentitle him to insist in equity on his legal priority acquired under the statute.

Thomson, Q.C., for appellants.

Rigby, Q.C., for respondent.

Appeal allowed with costs.

GUILFORD v. ANGLO FRENCH S. S. CO.

Master of ship, dismissal of—Shareholder in ship—Damages—Misdirection—New trial.

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making absolute a rule *nisi* to set aside a verdict of $2,000 damages.

The action was brought by appellant against respondents to recover damages for an alleged breach of contract. The plaintiff was Master of S. S. George Shaltuck, trading between Halifax and St. Pierre. She was owned by defendant Company, the plaintiff being one of the largest shareholders of the Company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre 48 hours, but the time was afterwards lengthened to 60 hours by the Company, yet the plaintiff insisted on remaining only 48 hours against the express directions of the Company's agent at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was on the 22nd May, without prior notice, dismissed from the service of the Company.

The case was tried before Sir W. YOUNG, C.J., without a jury, who gave judgment in favour of appellant for $2,000, and in estimating damages the learned Judge considered the appellant to be a part owner in the steamer, and that he was not a master in the ordinary sense. The verdict was set aside by the Supreme Court of Nova Scotia.

Held, that appellant, although a shareholder, had no title whatever to any share of the ship, and that damages were allowed upon an erroneous principle; that a new trial was properly ordered in order to determine whether irrespective of the appellant being a shareholder, the causes of dismissal relied upon and the evidence given thereof were sufficient to justify dismissal without notice.

Thompson, Q.C., for appellant.

Rigby, Q.C., for respondent.

Appeal dismissed with costs.

TROOP ET AL. v. HART.

Trover—Sale—Lien—Insolvent Act, 1875 *Proving on estate—Effect of*

This was an action of trover, charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. Richardson, the respondent's assignor. One of the branches of the appellants' business, was the supplying of merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold, and the proceeds placed by appellants to the credit of their customers. One Shaw, who so dealt with appellants, in October, 1877, sent 77 barrels of herrings and 236 barrels of mackerel; and, on the 3rd November same year, while these fish were in the store of appellants, sold the 236 barrels of

mackerel, along with a quantity of other fish to W. M. Richardson at $8 a barrel. Richardson paid half in cash and gave Shaw a note for the balance at four months. This note was given to appellants by Shaw on account of his general indebtedness. On the 4th of March, 1878, Richardson became insolvent, and the respondent was subsequently appointed assignee, and demanded and brought an action to recover the 236 barrels of mackerel. After issue was joined, the appellants proved against the estate of Richardson on the note, and received a dividend on it. The Chief Justice at the trial gave judgment for $1,888, less $46.19 for one month's insurance and six months storage, and found that the defendants had knowledge that the fish sued for were included by insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting.

Held, (affirming the judgment of the court below, STRONG, J., dissenting) that the defendants failed to prove the right of property in themselves upon which they relied at the trial; that the property was in the respondent, who had, as against the appellants (no claim for lien having been set up) a right to the intermediate possession of the fish.

2. That as the fish had not been stored with appellants by way of security for a debt due by insolvent, appellants would at the same time make a claim on the estate for the whole amount of insolvents note, receive a dividend thereon and retain possession of the fish.

Thompson, Q.C., for appellants.

Rigby, Q.C., for respondent.

Appeal dismissed with costs

DOMINION TELEGRAPH CO. v. SILVER ET AL.

Libel—Slander—Telegraphic message—Liability of telegraph companies—Special damage—Evidence—Excessive damages—43 Vict., ch. 37., sec. 5—New trial.

This was an action brought by the respondents as partners in trade for defamation of the respondents in their trade. In the declaration it was alleged: 1. That respondents were wholesale and retail merchants at Halifax, and that appellants wrongfully, falsely, and maliciously, by means of their telegraphic lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated, and published the false and defamatory message following: "John Silver & Co., wholesale clothiers of Greenville Street, have failed, liabilities heavy." 2. That same message was published elsewhere. 3. That the appellants promised and agreed with the proprietor or publisher of the St. John *Daily Telegraph* newspaper, and entered into an arrangement with him whereby the defendants agreed to collect and transmit by means of their telegrapic lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages and should publish them in his newspaper, and that in pursuance of said agreement the appellant wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office, &c., &c., the said message, whereby many customers who had heretofore dealt with them ceased to do so, and their credit, business &c., were thereby greatly damaged.

The appellants denied the several publications charged, and also denied the entering into the agreement mentioned in the 3rd count, and the forwarding of the message as alleged. At the trial it was proved that the telegram which was published in the morning paper was contradicted in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatches were not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with respondents, as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange, and sometimes discounting their notes. The counsel for the defendants moved for a non-suit, which was refused, and the case was submitted to the jury, who, upon the evidence, rendered a verdict for the plaintiff, with $7,000 damages.

On appeal to the Supreme Court of Canada it was

Held, 1. (Sir W. J. RITCHIE, C.J., *dubitante*, and HENRY, J., dissenting), that the damages were excessive, and that under the Act further to amend the Supreme and Exchequer Court Act, 43 Vic., ch. 37, sect. 5, this Court in the exer-

cise of its discretionary power, can order a new trial on that ground.

2. (Per STRONG, TASCHEREAU and GWYNNE, J J.,) that no special damages having been alleged in the declaration, the evidence as to special damages, which had been objected to, was inadmissible, and therefore a new trial should be granted.

3. (Per GWYNNE and TASCHEREAU, J J.,) that, assuming the agreement between Snyder and publisher to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant Company, the evidence established that the defendants collected the news, &c., for the proprietor of the newspaper as his confidential agents and at his request, and that they were not responsible for the publication by the publisher of said news for which the damages were awarded.

McCarthy, Q. C., and *Rigby*, Q. C., for appellants.

Thompson, Q.C., for respondent.

Appeal allowed with costs.

COURT OF APPEAL.

From Chy.] [March 24.

PIERCE v. CANAVAN.

Mortgage—Equity of redemption—Indemnity.

B. owned lots D and E, and mortgaged them. The mortgagee (J.) assigned the security and afterwards bought up the equity of redemption. The plaintiff subsequently purchased from J. lot D, for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E to a *bona fide* purchaser who conveyed to the defendant, he having notice of the mortgage :

Held, (affirming the judgment of the Court below, reported in 28 Gr. 325), that the plaintiff was entitled to be indemnified out of lot E to the full extent of the value thereof against the amount due on the mortgage.

Osler, Q.C., and *F. Hodgins*, for the appeal *Ewart* and *W. Roaf*, contra.

From Chy.] [March 24

NORRIS v. MEADOWS.

Mortgage--Purchase of part of mortgaged estate—Purchaser.

M., who was the owner of Whiteacre and Blackacre, subject respectively to incumbrances of $1,600 and $500, sold Whiteacre to C. subject to the $1,600 mortgage, with covenants for title, the mortgage debt in reality being the consideration or purchase money therefor. M. afterwards sold Blackacre to N., subject to the $500 mortgage; the conveyance, however, contained absolute covenants for title, the payment of the $500 being taken as part of the consideration. Default having been made in payment, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the $1,600 mortgage.

Held, affirming the judgment of the Court below (reported in 28 Gr. 334), that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate.

Bethune, Q.C., and *McLean*, for appellant.

E. Blake, Q.C., contra.

From Q. B.] [March 24.

BARBER v. MORTON.

Principal and surety—Varying contract.

By agreement entered into between the plaintiff, the defendant, and one P., the defendant undertook to guarantee the payment of whatever goods P. should order of the plaintiff, and who in consequence sent to P. a quantity of goods ordered by P. in writing, and in addition consigned others not ordered, which were invoiced at prices higher than were quoted by the plaintiff and those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, the plaintiff presented to the defendant for signature a bill of exchange upon P., which the defendant signed, thinking that it was to cover the price of the goods as ordered.

Held, reversing the judgment of the Court below, that, as all that had been done by the plaintiff had been done in the strictest good faith, the defendant was liable for the price of such of

the goods as had been ordered; but as to the remainder, that the consideration had failed.

Bethune, Q.C., for appeal.

E. D. Armour, contra.

From Chy.] [March 24.

INGRAM v. TAYLOR.

Married woman—Interpleader.

The plaintiff, who had been married since 1864, cultivated land, one half of which had, in 1874, been devised to her by the father of her husband, the other half of which had been in like manner devised to her son. In an interpleader action between her and an execution creditor of her husband,

Held, (affirming the judgment of the Court below, 46 U. C. R. 52), that the plaintiff was entitled to the crops on the whole farm as against the execution creditor.

Bethune, Q.C., and *J. K. Kerr*, Q.C., for appeal.

M'Carthy, Q.C., contra.

From C. P.] [March 24.

CARLISLE v. TAIT.

Chattel mortgage.

Held, (reversing the judgment of the Court below, in 32 C. P. 43), that the affidavit of the *bona fides* of a chattel mortgage, when made by the agent of the mortgagee, need not state that he is aware of the circumstances connected therewith. *The Freehold Loan and Savings Society* v. *Bank of Commerce*, 44 U. C. R., commented on and explained.

Held also, (Patterson, J. A., dissenting,) that when a chattel mortgagee, on default, proceeds to a sale under the powers in his mortgage, the purchaser is not in a position to re-file the mortgage which is satisfied as to the goods; nor need he (the mortgagor remaining in possession) file a bill of sale from the vendor in order to preserve his rights as against creditors of the mortgagor.

Moss, Q.C., for appeal.

McClive, contra.

From Chy.] [March 24

LEAMING v. WOOD.

Garnishing equitable claim—Receiver—Judicature Act, (O.) rule 370.

Where moneys were payable to G. as rents of real estate of which a Receiver had been appointed, the Court, on the application of execution creditors of G., *held*, that they had a right to garnish these moneys in the hands of the Receiver, and that, whether he is, under the words of Rule 370 of the Judicature Act, to be considered as a debtor of G. or not; although it would be necessary to obtain permission of the Court of Equity to proceed against G.'s interest in such lands before proceeding to a seizure and sale thereof.

In re Cowan's Estate, 14 Ch. D. 638, considered, approved of and followed.

R. M. Wells and *G. T. Blackstock*, for appellant.

W. Cassels and *J. Roaf*, for respondents.

CHAMBERS.

Boyd, C.] [Dec. 17, 1881.

SUTHERLAND v. MCDONALD.

Security for costs — Wilful mis-statement of plaintiff's residence.

Where plaintiff, resident without the jurisdiction, wilfully stated in his bill that he resided within it, security for costs was ordered.

A subsequent application to rescind the order, on the ground that the plaintiff had returned within the jurisdiction and intended to remain there was granted, but an appeal was allowed and the order for security directed to stand.

Mr. Dalton, Q. C.] [April 1, 1882.

DAVIS v. WICKSON.

Examination of parties.

Held, that in actions in the Chancery Division the defendant may be examined at any time after his defence is filed, or after the time for filing the same has expired.

D. E. Thomson, for defendant moving.

Wardrop, contra.

Mr. Dalton, Q.C.] [April 5.

KEEFE v. WARD.

Master in Chancery—Jurisdiction to commit for non-production of documents—Rule 420, O.J.A.

Held, that the power, formerly exercised by the Referee in Chambers, to commit parties for non-production of documents, is not vested in the Master in Chambers.

Symons, for the motion, *ex parte*.

CORRESPONDENCE.

Administration of Justice in British Columbia.

To the Editor of the LAW JOURNAL.

SIR,—There is one passage in your interesting article on this subject which seems likely to mislead those who rely on it for information—a result which I am sure you would sincerely regret. It appears on page 28.

"In 1872 a Royal Commission by Letters Patent under the Great Seal appears to have been issued in the same ample terms and with all and singular the same jurisdiction, power and privileges in every respect as those of the other two judges (who had been appointed by Imperial Order and Royal Sign Manual) to the Honorable Mr. Justice Gray, as a puisne Judge of the same Court; and a B. C. Act, passed for the occasion, added, as far as it could, local sanction to the appointment and its terms. It is therefore, according to these authorities, no mushroom tribunal but an old and honoured Court of imperial statutory, creation and descent."

Now the facts in regard to Mr. Gray's appointment are as follows:—In April, 1872, the Legislature of British Columbia passed an Act (Cons. Stats. c. 56) which, after reciting among other matters, that by s. 92 of the B. N. A. Act it is provided that in each Province the Legislature may exclusively make laws in relation to * * * the administration of justice in the Province, including the constitution, maintenance and organization of the Provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts, enacts that it shall be lawful for the Governor-General to appoint a judge of the Supreme Court of British Columbia in addition to the number of judges authorized by the "Supreme Court's Ordinance, 1869," and that after the passing of this Act the said Court may be held before any one or more of the judges already appointed or to be appointed under this Act; and another section gives (or at least purports to give) the additional judge the same powers as the other Puisne Judge. Two months later the Dominion Parliament (35 Vict. c. 20) provided for the salary of the additional judge, and subsequently the Governor-General appointed Mr. Justice Gray to the office

One other passage in your article puzzles me—the statement that "*by statutes framed directly under the eye and order of the Imperial Government*" all the powers of the two original Courts were concentrated in the present Court, &c. Does that mean anything more than that the statutes referred to were passed by the Legislature of the Colony of British Columbia before the union with Canada?

It is to be hoped that the elaborate judgments rendered by the three judges on the constitutional questions raised in the *Thrasher Case* will be published, for, though very lengthy, they are of unusual interest and importance, not only to British Columbia but to the whole of Canada.

Yours truly,

Victoria, B. C. EDWIN JOHNSON.

[We are glad to hear from our correspondent on a matter which is of much interest from a constitutional point of view, and of special interest of course in British Columbia. A careful perusal of the judgment in the *Thrasher Case*, now published, will probably clear away some of his difficulties, and we think substantially confirm the views expressed in the article on the subject referred to.

The B. C. Supreme Court spoken of by us as having been of Imperial creation and descent, is so exhibited in the Orders of the Queen in Council of the 6th April, 1856, and the Imperial Act, the 12 & 13 Vict., (1849), while Vancouver Island was a direct dependency of the Crown governed by Order in Council. We would also refer our correspondent to the Imperial Act to provide for the Government of British Columbia, (April 2, 1868), and the Orders of the Queen in Council thereunder in relation to B. C. as a colony, and all the subsequent legislation of the colony, and another Act specially prepared in and sent out for adoption from the Colonial Office—"The Supreme Court's Ordinance, 1869," and the "Court's Merger Ordinance, 1870,"—which (in confirmation of the Union Act of the Colonial Legislature) merged, or, as the article in question expresses it, —concentrated all the powers, rights, privileges and jurisdiction of all the pre-existing chief Courts and Judges of the formerly separate Colonies of Vancouver Island and British Columbia, in the present Supreme Court of British Columbia. It will also be seen that in s. 7

of the "B. C. Supreme Courts Ordinance, 1869," there is a saving and confirmation of the tenure, jurisdiction and authority of the Judges of these various Courts as concentered in the said single Court and its judges. The same powers, authority and jurisdiction were conveyed by Royal Commission to the Hon. Mr. Justice Gray, extending over all British Columbia, the same as the other Judges ; and the same thing happened on the appointing of the Hon. Mr. Justice McCreight, and their late lamented colleague the Hon. Mr. Justice Robertson.

The judgment in the case our correspondent speaks of, if we understand it aright, sets forth the Superior Judges as appointed and paid by the Dominion, and that on their appointment all their rights and privileges are at once attached and vested in them. The Local Legislature asked for their appointments under the Act of 1872, and so were concurring, and as they gave all they could, whatever their exact powers were, they certainly appear to have by B. C. Statute added a local sanction to the judicial appointment and its terms—a chief one of which was, of course, the pay they were to receive from the Dominion.

It might be well, now that we are again alluding to this subject, to supply what might seem to be an omission in reference to our remarks as to the *Thrasher Case*, *ante* p. 129, and as to the complaint therein of injustice done to the complainants.

The Administration of Justice Act, 1881, section 28, had not only purported to enact "that the Judges of the Supreme Court of British Columbia, should have power to sit together in the City of Victoria as a full Court and any three of them should constitute a quorum," but had added, "and such full Court shall be held only once in each year, at such time as might be fixed by Rules of Court," Now the Act came into force by proclamation, on the 28th June, 1881, and on the day before, the 27th June, 1881, (that year), the full Court had already sat. Previously to the passing of this section 20, and of the Rule 401 A, the full Court had sat, and could sit every day, or any day that business required it, just as since that change they do now. The Thrasher people had therefore a double injury to complain of: (i.) That this Rule and section suddenly deprived them, after the commencement of their proceedings, of a right they had previously enjoyed, of having the judgment of a single Judge reviewed by the whole Court, and (ii.) also confined the possibility of such review to once a year, and, perhaps, that once had already expired.

SUPREME COURT OF BRITISH COLUMBIA.

GENERAL ORDER.

Whereas—By the Supreme Court Ordinance, 1869, section 13, the Chief Justice of British Columbia is authorized and empowered from time to make all such orders, rules and regulations, as he shall think fit for the proper administration of justice in the Supreme Court of British Columbia ;

And whereas, by the Court Merger Act, 1870, section 1, it was declared that the Supreme Court of British Columbia should be deemed to have come into existence on the 29th March, 1870, and it was by section 4 declared that nothing therein contained should affect any of the provisions of the said recited Ordinance of 1869 ;

And whereas, the Judges of Superior Courts have as of right and as part of their judicial authority power to make rules of practice and procedure in such cases, subject to the provisions of statutes made by a competent legislature ;

And whereas, it is considered that the Supreme Court of British Columbia and the Judges thereof, are by divers sections of the British North America Act, 1870, viz., in particular, ss. 96, 99, 100, 129 and 130, placed under the authority of the Parliament of Canada ;

And whereas, the Parliament of Canada has not made any law affecting the power of the Chief Justice or of the Judges of the said Supreme Court to make such rules of Court as in the said first recited Ordinance are mentioned ;

Now, therefore, Sir Matthew Baillie Begbie, Chief Justice of the said Court, does by virtue of the power expressed and contained in the said first recited Ordinance, and we, the said Matthew B. Begbie, and also H. P. P. Crease and J. H. Gray, Justices of the said Court, do by virtue of every power and authority, us in this behalf in any wise enabling, and so far as we lawfully can or may, and not further or otherwise, order as follows, viz :

Until further order herein, the body or code of rules known as "The Supreme Court Rules, 1880," as the same are referred to and more particularly described in the Order of His Honor the Lieutenant-Governor in Council, of the 16th day of October, 1880, and published in the British Columbia *Gazette*, (no. 42 of volume xx) on the said 16th of October, 1880, and so far as the same do not contradict nor are repugnant to any statute made and passed by a competent legislature, shall be the rules of practice and procedure to be observed in all suits, applications and proceedings, had or taken, with respect to any matters within the cognizance of the Supreme Court.

Matthew B. Begbie, C.J.
Henry P. Pellew Crease, J.
J. H. Gray, J.

Canada Law Journal.

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DIARY FOR MAY.

2. Tue... Primary Examination. Supreme Ct. Session begin.
3. Wed... J. A. Boyd appointed Chancellor, 1881.
4. Thurs. Primary Examination.
5. Fri.... Napoleon Bonaparte died, 1821.
7. Sun... *4th Sunday after Easter.*
9. Tue... County Court sittings for York begin. Court of Appeal sitting begin. First Intermediate Examination. Final Examination for Attorney.
11. Thurs. Final Examination for Call. Second Intermediate Examination.
14. Sun... *Rogation Sunday.*
15. Mon.. Easter Sittings begin.

TORONTO, MAY 1, 1882.

THE discussion of various matters connected with the administration of justice in British Columbia, bringing up grave constitutional questions, has recently received considerable space in our columns. A valuable addition to the learning on the subject has been sent to us by Mr. Alpheus Todd, in a letter which is published in another place. The judgments in the *Thrasher Case* referred to in this discussion, and now criticised by our highly valued correspondent, are printed in pamphlet form, and can be obtained at the office of the publishers of this journal. Those who wish to see both sides of the question should procure a copy, and form their own opinion. These judgments and Mr. Todd's letter will prove a mine of learning on a subject of increasing interest to the profession.

IN our review of recent English decisions in the present number we are able, for the first time, by reason of having reviewed the Law Reports up to date, to turn to the *Law Journal* reports, and notice those cases of important application which have not as yet appeared in the former reports. Our present issue reviews the cases in the January an February numbers of the *Law Journal* reports, and it will be a surprise to many probably to find that there are so many cases of considerable importance which have appeared there so long ago as January or February, but which have not as yet been reported in the official reports. This would not be a matter of surprise if these were decisions of the various Divisional Courts merely, for it might then be supposed that they were standing for appeal, and that the editors of the Law Reports were waiting, so as to carry out their very convenient practice of reporting at the same time the decisions in the Court *a quo* with the decisions in the Court of Appeal; but it will be found that several of the cases we review in this number are decisions in the Court of Appeal. By the end of the year we shall, perhaps, be able to form an estimate of some real value as to the usefulness of the *Law Journal* reports.

PROBABLY few funnier things have ever come before a Court of Justice than the following agreement, made between the parties concerned previously to entering the bonds of matrimony. It is to be found given in its beautiful entirety in the recent case of *Dagg* v. *Dagg*, 51 L.J. N.S. 19, in which the husband was suing for dissolution of the marriage in question The male to the agreement, be it remembered, was a porter, and the female party a cook in a hydropathic establishment; and it is necessary to add, we regret to say, that the porter had been guilty of certain familiarities with the cook, which one would have hoped a man of his refinement would have shrunk from. This is the agreement:—

"This is to certify that whereas the under-

signed parties do agree that they will marry, and that only to save the female of us from shaming her friends or telling a lie; and that the said marriage shall be no more thought of, except to tell her friends that she is married (unless she should arrive at the following accomplishments, namely: piano, singing, reading, writing, *speaking* and *deportment*); and whereas these said accomplishments have in no way been sought after (much less mastered), *therefore the aforesaid marriage shall be, and is, null and void;* and whereas we agree that the male of us shall keep his harmonium in the aforesaid female's sitting-room, and agree that it shall be there no more than four months, and that from that time the aforesaid and undersigned shall be free in every respect whatsoever of the aforesaid female, as witness our hands, etc., Catherine L. H. Jeffries, William Pritchard Dagg."

Who can doubt, from internal evidence, that it was the "male of us," the elegant and accomplished, but too fastidious, Dagg, who penned this agreement with his own hand? Who can help admiring his heroic condescension in marrying the illiterate "female of us," even though she had in no way sought after, much less mastered, the accomplishments of piano, singing, reading, writing, speaking and deportment? Lastly, who will not deplore the hard-heartedness of the judge who refused to grant poor Dagg's petition, and dissolve his marriage with this uncongenial "female of us?"

RECENT ENGLISH DECISIONS.

Having disposed of the March numbers of the Law Reports, and the April numbers not having yet arrived, we can now turn to the *Law Journal* Reports for the present year, and note such decisions therein as have not already been reviewed as reported in the Law Reports, and which appear to require notice.

VENDOR AND PURCHASER—LEASE.

In the January number of the *Law Journal* Reports the first case requiring notice, and which has not as yet been reported in the Law Reports, is *Ringer* v. *Thompson.* This was a summons under the Imp. V. & P. Act, 1874, (R. S. O., c. 109, sect. 3), by the vendor of an under-lease, to have it declared that he had satisfied a requisition as to the performance of covenants in the superior lease, the under-lease being subject to the same rent and the same covenants as the superior lease. The evidence of performance furnished by the vendor, consisted of an affidavit that (i.) he had been in possession of the premises without other disturbance than a certain action brought by the landlord to recover possession for breach of covenant, but stayed in default of delivery of particulars of breaches; (ii.) that he had repaired the premises; (iii.) that to the best of his knowledge and belief the covenants had been performed. Fry, J., held that this, coupled with the fact that the purchaser had access to the premises, but had adduced no evidence of any breach, was such *prima facie* evidence in the affirmative of the performance of the covenants as could be reasonably expected.

LODGERS AND BOARDERS—DISTRESS.

The next case requiring notice, *Morton* v. *Palmer*, is of importance as it goes far to decide the moot question of what constitutes a "lodger" under the Imp. Lodgers' Protection Act, 1871, which has been adopted by us in 43 Vict. c. 16, Ont. Brett, L. J., after referring to some tests which the Courts have in previous cases given, which help to decide whether a person is a lodger or an under-tenant, says:—"It follows, as it seems to me, that the person who takes in another to lodge must retain power in and dominion over the house, as the master of a house usually does in this country. It is not absolutely necessary that he should live in or sleep in the house: he may live elsewhere, and yet reserve power in and dominion over the house, such as a master of a house does in this country

usually have. If, however, he goes away, if he gives up all power of dealing with the house as master, then I do not think that it is possible to say that he takes another person to lodge with him;" and the other Judges of the Court of Appeal concur in this view.

This completes the cases in the January number, and we can now proceed to the February number of the *Law Journal* Reports.

SPECIFIC PERFORMANCE—MISREPRESENTATION.

The first case in this number, *Goddard* v. *Jeffreys*, requires notice. In it a purchaser resisted specific performance of a contract for the sale of certain houses (i.) on the ground of mistake; (ii.) on the ground of misdescription. (i.) As to mistake, Kay, J., reviewing the case, deduced the following as the rule in respect to what sort of mistake on the part of the purchaser will enable him to resist specific performance:—"A purchaser may escape from his bargain on the ground of mistake, if it was a mistake that the vendors contributed to—that is, in other words, if he was misled by any act of the vendors; but if he was not misled by any act of the vendors—if the mistake was entirely his own—then the Court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship;" and taking this as the rule, he decided against the defendant in the case before him. (ii.) As to the question of misdescription, the purchaser alleged (*a*) that the length of the term for which a tenant of the vendor held a portion of the property was misstated in the particulars of sale. Kay, J., however, held that the *onus* was upon the purchaser to prove,—where it was not a question of the length of the term sold, but of the length of the possession of a tenant under the vendor—that a misdescription of the length of the tenancy tended to injure him; and that as in the case before him he had not ventured even to allege that he would suffer any injury by it, this ground entirely failed; (*b*) that although before the time fixed for the completion of the purchase, the rental equalled the amount stated in the particulars, yet at the time said particulars were issued, the rents were not so high as stated. Kay, J., held that this defence was of no more weight than the others.

SOLICITOR—FRAUD OF CO-PARTNER.

Biggs v. *Bree*, p. 64, illustrates the rule that all the partners of a firm (in this case a firm of solicitors) are liable for money received by their firm in the course of their regular business, and in the discharge of its duty. In the present case the money was the deposit paid over by auctioneers, selling property under an order of the Court, to the solicitors of the party having the conduct of the sale. Bacon, V.C., said: "The innocent partners are the solicitors for the plaintiff having the conduct of the sale—officers of the Court, who know the decree for sale, and know that it is their plain duty to see that the deposit and the proceeds of sale are paid into Court. It was their plain duty to receive this deposit from the auctioneer, and they would have neglected their duty if they had not done so." While on this subject it may not be out of place to refer to *Re attorney*, 7 P. R. 174, in which Wilson, J., observes that in this country we have no such class of persons as scriveners, but solicitors receive money to invest generally, in the usual and ordinary course of their profession: thus showing that the distinction drawn in England between cases where one of a firm of solicitors has misappropriated money received to invest generally, and cases where he has misappropriated money received for the purpose of effecting some special investment, cannot apply here. In the former case, it is held in England, innocent partners are not liable, because to receive money for investment *generally* is not part of the proper business of solicitors, but of scriveners. (*Bourdillon* v. *Roche*, 27 L.J. Ch. 681; *Plumer* v. *Gregory*, 43 L.J. Ch. 803; Lindley on Partnership.)

Recent English Decisions.

WILL—REMOTENESS—CONDITION—ANNUITY—COSTS.

Of *Patching* v. *Barnett*, p. 74, we may observe that (i.) it illustrates the "perfectly well settled" rule of law, that where the age is part of the description of the devisee, if the gift is to the devisee who should attain that age, and the period of vesting is beyond the life in being and twenty-one years, the gift fails. In his judgment on this point, Jessel, M. R., observes: "We must not, because testators' intentions are every now and then frustrated by the application of rules of law, either attempt, on the one hand, to destroy those useful rules of law which exist against perpetuity or remoteness, or, on the other hand, break in upon recognized canons of construction merely for the purpose of giving effect to the testator's desires, where the law otherwise does not allow them to be carried into effect." (ii.) The testator bequeathed a certain chattel to "John, Duke of Bedford" upon certain conditions. The Duke of Bedford living at the date of the will and death of the testator was named "Francis." He died without fulfilling the condition. Malins, V.C., held that his executors in conjunction with present duke could perform the conditions imposed by the will. The Court of Appeal, however, held that on the death of Francis, the gift lapsed and fell into the general residue. (iii.) A codicil contained a gift to a lady of an "annuity or yearly sum," which the testator directed to be charged upon two certain farms, and if it was in arrear the annuitant might distrain; and if in arrear for a longer time, she might enter and receive the rents and profits. The Court of Appeal held this was a legal limitation of a rent charge, and the personal estate was not liable. Jessel, M.R., said: "There is no oneration or exoneration of personal estate. The personal estate is not charged at all. As I said before, those cases which say that where there is a bequest payable out of the personal estate the mere addition of a charge on real estate does not exonerate the personalty, have no application to a case where, from the construction of the instrument, the Court is led to the conclusion that the personal estate is not liable. (iv.) Lastly, a question arose as to costs, which gave rise to the following remarks from Jessel, M.R., which were concurred in by the other Judges of the Court of Appeal: "I think it important to say that in the the administration of real and personal estate, the modern rule is that the costs exclusively occasioned by the real estate are thrown upon the real estate; and the general costs of the suit are borne by the personal estate. But what I will call the increased costs arising from administering the real estate are, as a rule, thrown upon the real estate; and the Courts have been in the habit for several years past of apportioning these costs between each estate at the hearing, instead of throwing upon the taxing master the very difficult task of ascertaining how much of each bill of costs made out by the solicitors has been occasioned exclusively by the real estate administration, and how much by the personal estate administration. That rule has been found to be very convenient and to save great cost, great delay and great difficulty in the taxing office." And after observing that Malins, V.C., appeared to have adopted this course in the Court below, he added:—"I think it would not be right on the part of the Appeal Court to interfere with the discretion of the Judge in the Court below as to the apportionment of the costs."

PRACTICE—DISPENSING WITH LEGAL PERSONAL REPRESENTATIVE.

In *Curtius* v. *Caledonian Fire and Life Insurance Co.*, p. 80, the plaintiff, as assignee by way of mortgage of a policy of life insurance, sued the defendant company for the policy moneys, which were far less than the whole amount of his debt. The insured had died intestate and insolvent, and there was evidence showing that his widow and next kin disclaimed all interest in the policy moneys. Under these circumstances Jessel, M.R., had ordered payment and dispensed with the presence of a personal representative, under

Imp. 15-16 Vict. c. 86., sect. 44 (R. S. O. c. 49, sect. 9.) On appeal, the Court of Appeal held that he was right, and that the Court had jurisdiction to make the order, although it was agreed that the section was inapplicable to a case where there is a contest between the estate and claimant. Baggally, L. J., said:—"Here the case is clearly within the section. The deceased person was interested. He was insured in the office and is dead, and has no legal personal representative. It is clearly a case where a judge might, if he thought fit, dispense with the presence of a legal personal representative. But it is said, that in many instances the Court has not thought fit so to intervene. In every case cited for that purpose the Court went on the special circumstances of the case then before it. In some there were proceedings actually pending with reference to the appointment of a legal personal representative, in some litigation with reference to this very point, and there the Court has not thought fit to dispense with the appearance of the legal personal representative. Then again there were other cases of such a character, that duties had to be performed by the legal personal representative, and therefore the Court did not act on the powers conferred on it; and if any of the cases cited is looked into, it will be seen that it turns upon its own special circumstances."

PARTNERSHIP—DISSOLUTION—GOODWILL.

Leggott v. *Barnett*, p. 90, is an interesting case on the subject of goodwill. There had been a deed of dissolution of partnership executed, by which the defendant assigned and transferred to the plaintiff all his individual share in the stock-in-trade and effects of and belonging to the late partnership business. Nevertheless the defendant, after this dissolution, sent out circulars to the customers of his old firm soliciting their custom, and there was evidence that several of such old customers had commenced dealing with him. The plaintiff, therefore, brought an action against him for an injunction to restrain him, not only from soliciting the old customers, but also relying on a *dictum* of the M. R. in *Ginesi* v. *Cooper*, L. R. 14 Ch. D. 596, from actually dealing with such customers. The M. R. granted an injunction as asked. The defendant did not dispute the first part of the injunction, and only appealed as to the second part. Some of the judges of the Court of Appeal, however, take occasion to express opinions in favour of the first part of the injunction. Thus Brett, L. J., says:—"The mere fact of the other going out of the partnership, if nothing else was stated, left the goodwill in the other partner. * * * It being a deed dissolving a partnership, it follows that the goodwill is left to the partner who retains the business. * * * And I should say, where there is a dissolution of partnership for valuable consideration, that the outgoing partner who dissolves the partnership for good consideration, does impliedly contract that he will not immediately afterwards do away with that for which he has been paid by soliciting the customers, and so practically destroying the goodwill which he has agreed to leave with the surviving partner."

But the question really before the Court on the Appeal, was whether there was anything that would justify the Court in construing a sale of goodwill as an implied contract not to deal with any customers of the old business, the goodwill of which was sold. The Court held, unanimously, that there was not. Thus Cotton, L. J., says:—"No case has ever laid down, that a man who has sold his goodwill, although he set up a shop next door, was not justified in dealing with the customers of the old firm whom he did not solicit to come there. In *Churton* v. *Douglas*, John 174 the judgment of the V. C. quite concurs, I think, with the previous decisions, in assuming that the defendant might, if he thought fit, have carried on business with the customers of the old firm, provided that he did not represent to them that his was the

old business, or that he was the successor in business of the old firm." The Court, also, held that they could not prevent the defendant from dealing with those customers, whom he *had* solicited. This would really, as Brett, L. J., points out, be enjoining the public, and depriving them of the liberty, which anybody in the country might have of dealing with whom they like.

INTERPRETATION OF CONTRACTS—RECITALS.

In the above case, moreover, previously to executing the formal deed of dissolution, the partners had signed a written agreement for dissolution, which was in some ways more specific in its terms than the deed, and was recited in it. This gave rise to some *dicta* on the interpretation of contract. Thus James, L. J., with the entire concurrence of Brett, L. J., says: "I think it is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract, which is to be found in the deed itself. A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament or any other instrument, as showing what the object of the parties was, and what they were about to do, so as to afford a guide in the construction of their words; but you have no right, for any other purpose, to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud or for altering it on the ground of mistake."

And Cotton, L. J., enunciates another principle on the same subject, viz: "Where parties have made a bargain and have contracted as to what rights one party shall gain over the other by the bargain, we ought not to put a forced interpretation on particular words used in the bargain in order to remedy what we may think in the particular case is a hardship on one of the parties."

It may be observed in passing that in a case a few pages on, *Walker* v. *Mottram*, the rule which precludes the vendor of the goodwill of a business from soliciting the former customer, though again affirmed by the Court of Appeal as regards voluntary sales, was held not to extend to the case of a compulsory alienation, as where, on bankruptcy, the business and goodwill have been sold by the trustee in bankruptcy.

MISREPRESENTATION—RESCISSION OF CONTRACT—ONUS.

Redgrave v. *Hurd*, p. 113, contains some lengthy judgments of the Court of Appeal on the above subject. The defendant resisted specific performance of a contract entered into with the plaintiff, on the grounds of misrepresentation by the latter as to the value of the business done by him as a solicitor. The evidence shewed that the defendant made some personal investigation into the affairs of the plaintiff to satisfy himself as to the value of his business, and Fry, J., citing *Atwood* v. *Small*, 6 Cl. & F. 232, held that if he made these enquiries carelessly and inefficiently, it was his own fault, and that having inquired to a certain extent, he could not now have the contract set aside. Jessel, M. R., in a long judgment, in which the other two judges concur, over-rules this statement of the law. He reviews at great length *Atwood* v. *Small*, and concludes as to it that: "In no way, as it appears to me, does the real decision, or do the real grounds of decision support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud, to say that the man who comes to set aside the contract enquired to a certain extent, but did it carelessly and inefficiently, and therefore did not observe the fraud, and is thereby prevented from upsetting the contract."

And after remarking on the difference which formerly existed between the rules of Courts of equity and the rules of Courts of common law as regards the rescission of a contract, he says: "Nothing can be plainer, I take it, on the authorities in equity, than that false representation is not got rid of by the defendant—that is, the person resisting its performance, or asking for rescission on the ground of deceit—being guilty of negligence. One of the most familiar instances in modern times, and one which occurs in case after case, both reported and unreported, is this: Men issue a prospectus containing false statements—false statements of the contracts made before the formation of the company, and on similar matters—and then say the contracts themselves may be inspected at the office of the solicitors. It has always been held that those who accept these false statements as true are not deprived of their remedy merely because they neglected to go and look at the contracts themselves, though they were told the contracts were in writing and might be inspected if they asked to see them. * * * It is not sufficient, therefore, to say that a man has had the opportunity of investigating the real state of the case, but has not availed himself of that opportunity." Moreover, both the M. R. and Baggallay, L. J., make some remarks to the same effect on the onus in such cases. The latter says, as to this: "Where a false representation has been made, it lies on the party who makes it, if he wishes to assail it, to show that although he made the false representation, the other party did not rely upon it. The *onus probandi* is on him to shew that the other party waived it and relied on his knowledge."

COVENANTS—ASSIGNEE WITH NOTICE.

The last case in the February number of the *Law Journal* reports which has not been reported in the Law Reports, and which requires notice here, is *Haywood* v. *The Brunswick Benefit Building Society*. In this case certain land was granted to one J. in fee subject to a rent charge. The grantee covenanted for himself and his heirs, etc., that he, his heirs or assigns, would pay the rent, erect buildings on the land and thereafter keep them in repair. The plaintiff was assignee of the rent charge, with the benefit of all the covenants. The defendants were mortgagees in possession subject to the covenant, and the plaintiff sued them on the covenant to repair. Two questions, therefore, arose: (i.) whether the covenant to repair ran with the land, so as to impose a liability on the defendants; (ii.) whether the defendants were bound to repair on the ground that an assignee of property taking property with notice of a covenant of a certain class, is bound by reason of the notice in such a way that a Court of equity will oblige him to observe the covenant. As to (i.) all the judges of the Court of Appeal held that the covenant did not run with the land, and that the plaintiff, therefore, had no right of action at common law. Cotton, L. J., said, as to this:—"For a covenant to run with the land it is necessary that it should affect the land, do benefit to the land or affect the rent issuing out of the land. Now this covenant does not affect the rent issuing out of the land—it is only a covenant to do something which shall be an improvement to the land, so that it is not a covenant within the second resolution in *Spencer's Case*, 1 Sm. L. C. (Ed. 8.) 68. It is unnecessary to consider whether it is a covenant the burden of which runs with the land, although I am not inclined to favour that view; but it is clear I think, that at common law this covenant would not run with the rent." (ii.) As to the remedy at equity, the unanimous view of the judges is concisely expressed by Lindley, L. J., thus:—"The doctrine is laid down in *Tulk* v. *Moxhay*, 2 Ph. 774, and *Cox* v. *Hislup*, 26 L. J. Ch. 389, and both these cases are different from the present. The former case shews that if a person buys land with notice of a restrictive covenant, he will be bound to

perform it. Now restrictive covenants are those which, so far as they are enforced, can be observed without expenditure of money or outlay. In such a case such a covenant will be enforced, even against a tenant from year to year, as is manifest from *Wilson* v. *Hart*, L. R. 1 Ch. 463; but with the exception of *Cooke* v. *Chilcott*, L. R. 3 Ch. D. 694 there is no authority to shew that the Court of Equity has ever extended the doctrine of *Tulk* v. *Moxhay* so to enforce anything more than abstention."

In the next number the arrival of the April numbers will make it necessary to return to the Law Reports. A. H. F. L.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [April 8.

PETRIE V. GUELPH LUMBER CO. ET AL.

Misrepresentation in prospectus of company.

In this case the plaintiff filed his bill against the company, and certain individual members and promoters of the company. As regards the latter, he charged that they had concocted a scheme to form the incorporated company with limited liability, with the fraudulent intention of inducing the company to assume their business as lumberers, in order, not only to relieve themselves from the personal liability and risk involved in further carrying on the business, but also for the purpose of enabling them more successfully, as a company, to induce the public to advance money to extricate them from the financial difficulties in which they were placed; that he became a subscriber for shares, relying on certain fraudulent statements contained in the prospectus circulated by the defendants or their agents, as to the flourishing condition and hopeful prospects of the business; whereas the plaintiff charged that the said defendants well knew at the time that the business was an unsuccessful, unprofitable, and a failing business, and he claimed an order for repayment to him by the said defendants of the amount he had subscribed with interest.

Held, on the evidence as to this part of the case, that, although there was perhaps enough shown to have given the right to the plaintiff to have a rescission of his contract had he come to the court in good time, and although inaccuracies had been shown in the prospectus, and a degree of negligence whereby some of these inaccuracies arose and crept in, yet that the defendants had not been shewn to have been guilty of any fraudulent intent, or in other words, of "moral" fraud, as distinguished from "legal" fraud.

Held, also, that the suit was, as regards these defendants, simply an action of deceit, and whether the fraud is supposed to be a fraud in this court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit.

Held, also, as to the defendants, the company, that by his delay and his having acted at a meeting of shareholders after having knowledge of what he charged in his bill, or as much knowledge as he had when he commenced the suit, the plaintiff was precluded from asserting any right to have the contract for subscription for the stock rescinded, even supposing that he might have had such right otherwise.

Bill, therefore, dismissed with costs.

McCarthy, Q.C., for the plaintiff.

E. Blake, Q.C., with him *W. Cassels*, for defendants other than McLean and Ferguson.

Brough, for defendant Ferguson.

Bethune, Q.C., with him *Barwick*, for defendant McLean.

Boyd, C.] [April 22.

OAKLAND V. ROPER.

Treasurer's bond—R. S. O. c. 180, sect. 213. c. 204. s. 221.

Where a bond for the performance of his duties by the treasurer of a municipality, instead of following the form of words directed by the statute in force at the time of its execution, which directed the security to be "especially for duly accounting for and paying over all moneys which may come into his hands,"—limited the responsibitity to moneys coming into the

treasurer's hands "applicable to the general uses of the municipality."

Held, that clergy reserve moneys, and moneys derived from the distribution of the provincial surplus, which funds had by law been set apart for educational purposes, were not moneys "applicable to the general uses of the municipality" within the meaning of the bond, being moneys specifically appropriated to a particular purpose.

Held, also, that although R. S. O. c. 180, sect. 213, and c. 204, sect. 221, in terms declared that, "the bond of the treasurer and his sureties shall apply to school moneys," yet it appears from a reference to earlier statutes and otherwise, that (i) the term "school moneys" here refers to moneys provided by the legislature for the support of public schools; (ii) that the term treasurer applies to treasurers of counties, cities or towns, who deal directly with the Crown in respect to these moneys, and not to treasurers of townships who deal with the Crown through the medium of the counties in which they are; and moreover the statutory extension of the liability of the sureties should not obtain where the condition of the bond, indicated by the statute, has been departed from and limited, as in the present case.

Throughout municipal legislation, there is a plain distinction made between moneys or funds specifically appropriated and those unappropriated; between moneys applicable to special purposes and those applicable to general purposes, and it may also be taken that in these acts the terms "purpose" and "use" are synonyms.

Hardy, Q.C. (*Wilkes* with him) for plaintiff.
Smyth, for defendant Roper.

Ferguson, J.] [April 8.

ROBERTS V. HALL.

Adoption of child—Promise to make a will.

In this case the parents of the plaintiff, in 1846, entered into a written agreement with one Hall and his wife, whose representatives the defendants were, by which they agreed to give their daughter, the plaintiff, then six years old, to Hall and his wife, who were to adopt her as their own child and to make her the sole heir to their property in case they should have no child; but in case of their having a child, the plaintiff was to share equally with such child.

Held. 1. That this agreement was contrary to public policy and illegal, and specific performance could not be decreed. The law gives the father the custody and control of his children, and casts upon him the duty of caring for them and seeing to their education, and this duty he can neither renounce or delegate. The fact of the consideration having been executed does not entitle the plaintiff to specific performance by the other party in the case of such a contract.

2. That although the evidence shewed that up to the time of his death Hall intended that the plaintiff should have his property, and thought that the agreement he had made was binding in this respect, and that, therefore, it was unnecessary for him to make a will, and although it was urged that the plaintiff had been for at least five years in the service of Hall, after attaining full age, and this on the understanding, based on his statement, that she would be his heir, and that there was an agreement to that effect, yet inasmuch as the evidence was quire insufficient to show any agreement between Hall and the plaintiff, the latter could not succeed on this ground in establishing a right to the estate of the deceased.

3. That inasmuch as, if the parents of the plaintiff had brought a suit upon the agreement in this case, and recovered, they would be trustees of the proceeds for her, this entitled her to maintain the suit in her own name.

S. H. Blake, Q.C., for the plaintiff.
D. McCarthy, Q.C., for the defendant.

Ferguson, J.] [April 8.

WOLFE V HUGHES.

Contract of purchase—Pleading.

An agreement for the purchase of certain land, after providing for the payment of a certain portion of the purchase money, continued as follows: "The remaining $1,900 (after deducting the amount due to the Crown) payable in instalments of $100 each, without interest, on April 1st in each year during nineteen years,"—and the purchaser to secure by mortgage "the residue or sum of $1,900 (less the amount due to the Crown), payable as aforesaid."

Held, the true meaning of the above agreement was that the amount due the Crown was to

be substracted from the $1,900, and the balance paid in instalments of $100 each on April 1st in each year, until the whole of such balance should be paid; and it was the $1,900, less the amount due the Crown, which was to be secured by mortgage; and the purchaser had no right to apply any of the instalments in payment of the sum due to the Crown, or postpone payment to the vendor; and it must be *held* that the words, "during nineteen years," were employed either by error, or because it was not known how much was due to the Crown.

Semble: It does not follow that because a plaintiff asks in his bill for reformation of a document, that therefore a defendant in entitled to claim the same relief, though he has not asked for it.

S. H. Blake, Q.C., for the plaintiff.

McMichael, Q.C., for the defendant.

Ferguson, J.] [April 8.

BELL v. LANDON.

Trust—Administration—Account.

The bill charged that by a fraudulent and collusive sale, land of a testator was sold at an under value to one of the trustees and executors of the will, in the name of an accomplice.

The evidence did not support the above allegations; and moreover, by deed of March 6th, 1863, executed after the said sale, the various beneficiaries under the will, with one exception, (whose claim had, by the consent of all concerned, been compromised), assigned to the said trustee and executor all their interests under the will, on receiving a proper proportion of the sum actually realized at the sale. The deed recited that the assignors had carefully examined the accounts of the executors by themselves and their counsel, and also recited the fact of the sale, and that the assignors were satisfied with the result of it. All the parties were of full age and had professional advice, and all the circumstances attending its execution were fully explained.

Held, the deed was binding on the parties who executed it; and also the sale to the trustee was valid.

Held also, inasmuch as the accounts had, at the instance of one of the defendants, been brought into the Surrogate office upon a citation, that all parties interested were aware of, and had for eight years remained there without question, surcharge or falsification, the plaintiff was not entitled to have an administration of the estate.

Bill dismissed with costs.

Boyd, C.] [April 22.

WILMOT v. STALKER.

Statute of Frauds—Sufficient description of parties.

"Vendor" is not a sufficient description of the party selling to satisfy the requirements of the Statute of Frauds.

Where one of the conditions of sale was, "The vendor shall have the option of a reserved bid, which is now placed in the hands of the auctioneer;" and where that reserved bid was couched in the following terms: "Re sale Allan Wilmot's farm; reserved bid, $105 per acre;" and although it was conceded that the paper containing the reserved bid might be read as incorporated in the agreement signed by the purchaser at the foot of the conditions of sale, nevertheless it was *held* that the above words read together did not so indentify the vendor as to satisfy the statute. *Shardlow* v. *Cotterill*, L. R. 18 Ch. D. 293, and *Vandenbergh* v. *Spooner*, L. R. 5 Ex. 316, followed.

Maclennan, Q.C., for the plaintiff.

Foster and *Clark* for the defendant.

Boyd, C.] [April 22.

GILL v. CANADA FIRE AND MARINE CO.

Insurance by vendor under contract to sell.

1. A vendor, who has agreed to sell for full value, has nevertheless, pending the contract of sale, a perfect right to effect an insurance upon the premises sold.

2. If, under such circumstances, a vendor insures the premises describing them as "his," this is no such misrepresentation or misstatement as to invalidate the policy, where no enquiries have been made by the company as to the nature or extent of the interest of the applicant for the policy.

3. The fact of the vendor insuring under such circumstances, being an assignee in bankruptcy, makes no difference from the case of an ordinary vendor. The insurable interest of such an assignee who contracts to sell is not less at all events than that of an ordinary vendor.

4. Where the words in a condition in a policy are: "if the risk be increased or changed by any means whatever," the term "change" must be held to be used rather as a synonym of "increase" than as a word of different signification. *Ottawa Co.* v. *Liverpool Ins. Co.*, 28 U.C.R. 522, approved of.

Moss, Q.C., (*Muir* with him), for plaintiff.

W. Cassels, and *Laidlaw*, for defendants.

Boyd, C.] [April 22.

TRIBE v. THE LANDED BANKING CO.

R. S. O., c. 164, s. 50.

Semble: The above section is not limited in its application to what the Act refers to as "Permanent Building Societies."

Boyd, C.] [April 22.

SPROULE v. STRATFORD.

Party wall—Easement.

In the case of a party wall there is the right on the part of one owner to heighten that wall within certain limits, as, *e. g.*, when it can be done without injury to the adjoining building, and the wall is of sufficient strength to bear the addition. But this is subject to the right of the other owner to use the new part as a party wall, probably upon reasonable terms as to contribution towards the expense. And if the owner who thus heightens a party wall proceeds to pierce the wall for the purposes of a window, this amounts to distinct notice that he has ceased to regard the wall as a party wall, for party walls cannot have windows which open to the external air and admit light and air. The placing of the window is an attempt to change the wall in question, and to acquire rights therein which by lapse of time would prejudicially affect the other owner, and the further continuance of it may be enjoined. Dicta of Mellish, L.J., in *Weston* v. *Arnold*, L.R. 8 Ch., App. 1091 cited and approved of.

Bethune, Q.C., for plaintiff.

Hardy, Q.C., (with him *Wilkes*,) for the defendant.

Ferguson, J.] [April 25.

GILLIES v. MCCONOCHIE.

Parties—Rule 98, 99.

Motion by the executors of a will, (for the construction of which they had brought the present action), that it might be declared under rule 98, that the next of kin of the testator were sufficiently represented by those before the court.

There were certain charitable bequests in the will, which, if held invalid, would pass to the next of kin. Those who had been made defendants, and duly served with process and with notice of the present motion, were the widow of the testator, and four of his next of kin, being nephews and nieces of his, and the Attorney-General for Ontario.

It appeared that there was a very large number of next of kin, many of whom were not known, while the service upon others would be difficult and expensive.

Order granted under rule 98, on the ground that the next of kin were sufficiently represented by the parties before the court.

Hoyles, for the motion.

Symons, for next of kin who were made parties.

Boyd, C.] [April 27.

BANK OF COMMERCE v. BRICKER.

Agreements between solicitors.

Motion to vacate judgment and restore action to cause list for trial at the present sittings on the ground that defendant's solicitor had not been present at the hearing. As to costs, it was alleged by defendant's solicitor that there had been a verbal agreement between the solicitors of the parties, but there was a variance between the solicitors as to the actual agreement come to. The learned Chancellor said that the rule of Lord Bacon, requiring agreements between solicitors in reference to their client's causes to be in writing, was a wholesome one, and one that he intended to adhere to, and wherever there was a difference as to verbal agreements he would hold that the party relying on an alleged agreement must establish it by writing or he would pay no regard to it, it was impossible to enter on these motions into a nice calculation as to the weight of evidence upon such questions. In the present case, therefore, although it was reasonable that the defen-

dant should have on opportunity of making a defence, he would only vacate the judgment on the usual terms of the defendant paying the costs of the day and of the present motion.

C. Millar, for motion.

W. Cassels, contra.

CHAMBERS.

Mr. Dalton, Q.C.] [April 9.

MCDONALD V. FIELD.

Solicitor—Power to settle suit.

A solicitor has power to settle a suit so as to bind his client, if he acts *bona fide*, and as he believes best for the interest of the client.

J. E. McDougall for the plaintiff.

Caswell for the defendant.

Mr. Dalton, Q.C.] [April 5.

Term's notice to proceed.

Since the passing of the Judicature Act, a term's notice to proceed is not necessary, although a year has elapsed since the last proceeding.

H. W. M. Murray for the plaintiff.

Aylesworth for the defendant.

Mr. Dalton, Q.C.] [April 14.

TOWNSHIP OF MONAGHAN V. DOBLIN.

Examination of witnesses on a pending interlocutory motion, Order for—Rule 285.

The examination of witnesses who have not made affidavits on a pending interlocutory motion cannot be taken except under an order made under rule 285, O. J. A. G. O. Chy. 266 is superseded by the Judicature Act.

An appointment issued by a local Master for such an examination was set aside.

Watson for the motion.

H. Cassels, contra.

Mr. Dalton, Q.C.] [April 17.

HILLIARD V. THURSTON.

Transfer of actions—Power of Master in Chambers.

The Master in Chambers has no jurisdiction to transfer an action from one division of the High Court of Justice to another. Such power can only be exercised, if at all, by a Judge.

Watson for the motion.

H. Cassels, contra.

In a subsequent case, BOYD, C., made an order of transfer, subject to the consent of the President of the Division to which the case was transferred.

REPORTS

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

BURRARD V. CALISHER.

Imp. Jud. Act, 1873, sect. 56—Ont. Jud. Act, sect. 47—Official referee—Report.

[Jan. 23.—Ch. D., 51 L.J. N.S. 223.

KAY, J.—Although there should not be a hard and fast rule, for each case must depend upon its own circumstances, yet where under the above section the Court has directed "an account of all dealings and transactions between the plaintiff and the defendant" to be taken before the official referee, the referee should not simply certify the result, but should take the account in the way usual in the Chancery Division, and should set out the account, stating what items he has allowed and what items he has disallowed.

[NOTE—*The Imp. and Ont. sections are nearly, but not quite identical. In re Brook, 19 W. R. 820, noted 17 C.L.J., 391, is another recent case under the above section.*]

DEACON V. DOLBY.

Imp. Jud. Act, 1873, sect. 56—Ont. Jud. Act, sect. 47—Official referee—Report.

[Jan. 23.—Ch. D. 51 J.T. N.S., 248.

Where a trial of an action has been ordered to stand over until the official Referee has reported on matters referred to him, it is not necessary to move to confirm such report, after it has been made, before restoring the action to the paper for hearing.

Motion, that an action, adjourned under the circumstances indicated in the above headnote, might stand out of the cause paper, and not be

restored to the paper, for further hearing, until the report of the referee had been confirmed.

Beaumont, for the motion.—The plaintiff has treated the report of the offiical referee as a final report, and set down the action for hearing. This he ought not to have done until after a summons, or a motion to confirm the report had been heard: *Munro* v. *Randall*, L. R. W. N., 1878, p. 41.

KAY, J.—It may well be that if the Court directs a reference in the usual form of a reference to a chief clerk, and reserves further consideration, there ought to be a formal adoption of the report by the Judge before the trial comes on. But in such a case the adoption is the merest form. There is no argument before the Judge; it is the most formal thing possible, unless a summons to vary has been taken out. No summons is required, and the only way by which a report can be discussed is by taking out a summons, not to confirm, but to vary the certificate. Here I am asked to introduce an entirely new practice, and to delay the hearing of the action until a summons has been taken out to confirm the report, upon the hearing of which the party who does not like the report is to have the opportunity of disputing it before it can be confirmed. If there is to be any formal adoption of the report, let it be done as in the case of a chief clerk's certificate. I look upon this application as nothing but an attempt, by a side-wind, to get rid of the report. I dismiss the motion with costs.

[*See note to last case.*]

CORRESPONDENCE.

The Supreme Court of British Columbia.

To the Editor of the LAW JOURNAL.

SIR,—I have read with much interest the judgment of the Supreme Court of British Columbia in the *Thrasher Case*, and the correspondence which has appeared in your columns on the subject. The question therein discussed is one of considerable importance in its bearing upon the interpretation of the British North America Act, I therefore invite the attention of your readers to some further comments upon it from a constitutional point of view.

Notwithstanding my high respect for the learned judges who concurred in the decision upon the *Thrasher Case*—who have already rendered valuable service to Canada by their judgments upon various doubtful and intricate questions of constitutional law—I regret to be obliged to differ from them in their conclusions upon the present occasion.

The point principally involved in this decision is the question whether the Supreme Court of British Columbia is or is not a "Provincial Court" within the meaning of the 14th sub-section of clause 92 of the B. N. A. Act. If it be a "Provincial Court" the Local Legislature is clearly empowered under that sub-section, coupled with clause 129 of the statute, to control and regulate its procedure, and either itself make rules for that purpose, or else delegate the framing of such rules to some other competent authority.

By the 129th clause of our Constitutional Act the Imperial Parliament obviously intended to convey to the Provincial Governments and Legislatures in Canada exclusive jurisdiction over all juridical matters, which are not of Dominion concern, without regard to the particular antecedent authority which had previously legislated thereupon.

This provision, taken in connection with clauses 130 and 135 of the same statute, secures the unbroken continuity, jurisdiction and operation, within each province, of all laws, courts of justice, legal or executive institutions or tribunals which were previously in existence in any part of the new Dominion; except as otherwise provided by the statute itself.

It only remains to ascertain what courts, situate within the particular Provinces, are expressly subject to provincial legislation under the 14th sub-section of the 92nd clause of the B. N. A. Act. The words of this section are definite and explicit. They assign to the "exclusive" control of the Provincial Legislature all matters concerning "the administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters" therein. What Courts do actually exist in the several Provinces other than "Provincial Courts?" None, except the Dominion Supreme Court and the Maritime Court of Ontario, both of which were created by Dominion enactments; the first as a Court of Appeal for the whole Dominion, the other as a step towards the establish-

ment of Canadian instead of Imperial jurisdiction in matters now within the jurisdiction of the British Vice-Admiralty Courts, which are still in operation throughout Canada.

All other courts of law in the Dominion have, in point of fact, been subject since Confederation to the legislative control of the different Provinces, and have, from time to time, been remodelled and reformed at the will and pleasure of the respective Provincial Legislatures, without any interference or remonstrance on the part of the Dominion authorities. In the years 1878 and 1879, in the memorable contests which grew out of the Dominion Controverted Election Trials' Act, the Courts of Ontario and Quebec agreed that the Dominion Parliament though incompetent, under the B. N. A. Act, to alter the "constitution" of any Provincial Court, whether possessed of superior original jurisdiction or otherwise, was nevertheless at liberty to assign to the *Judges* of existing Courts—they being Dominion officers—additional duties for Dominion purposes, provided only that the same did not interfere with the primary and ordinary functions of the judges in holding Provincial Courts. This decision was ratified by the Dominion Supreme Court and approved by the Judicial Committee of the Privy Council. The judgment in this case effectually disposes of the distinction attempted to be drawn by the judges in British Columbia between superior and inferior courts in that Province, and of the assumption that the latter only were the proper subjects of Provincial Legislation, whilst the former were liable to be regulated and controlled only by the Federal Parliament.

And now as concerning the competency of the Legislature of British Columbia to enact rules for the conduct of business in the Provincial Courts.

The principle involved in this question was hotly contested in the Imperial Parliament between the years 1870 and 1875, when the reform of the judicature system of England was under discussion. The point then raised was as to whether the new rules of Court that must necessarily be prepared should be framed by the judges, by the Privy Council, or by Parliament. Setting aside old custom, individual preferences, and perhaps general expediency, which might incline in favour of one or the other method, the "omnipotence of parliament" ultimately prevailed. The rules were, for the most part, appended by Parliament to the Judicature Act, although permission was given for the drafting by the judges of Supplementary Rules. But before these Supplementary Rules could go into operation they had to be authorized by Order in Council, and then submitted to Parliament for forty days,—during which period they were open to rejection or modification,—afterwards, if not disapproved of by either House, they went into force. By this means the actual authority as well as the ultimate control of Parliament in the formation of rules for the guidance of the courts of law was recognized as being inherent in the supreme power. The question whether this function should be exercised by Parliament directly or through some intermediate agency was simply one of expediency and not of right.

A similar power must be admitted to exist in all Colonial Legislatures that have been authorized to regulate "the administration of justice" in the particular Colony or Province. Accordingly, in the Australian Colonies it has been customary by local enactment to empower the Judges of the Superior Courts to frame new Rules of Court when required, submitting the same for the information of the Local Parliament.* A similar direction is contained in the Statutes of Ontario. These Local Legislatures have not indeed gone to the length of insisting that all Rules of Court shall be subjected to their own legislative supervision before they go into force, but if the Legislature of British Columbia should deem it expedient to exercise a more direct authority in such matters, they are not usurping an unwarrantable power, but are acting within the limits of the jurisdiction assigned to them by the aforementioned subsection of the British North America Act.

It is true that in a Province the exercising of this particular function by the Legislature may, in some instances, be ill-advised and objectionable, but the remedy in this contingency consists, not in denying the authority of the Legislature, but in the lawful oversight of the Dominion Executive, who are free to remonstrate and to suggest the amendment by the local authorities of any objectionable enactment and if necessary to disallow it altogether.

The British Columbia Judges allege that they have already protested against much of the local legislation in judicature matters, but

that their protests have been disregarded both by the Imperial and by the Dominion Governments. May not this have arisen because their censures and complaints were too sweeping, and because they denied the existence of powers which, in the opinion of others, had been undertaken within constitutional limits? Had the Judges been satisfied with pointing out the possibly injudicious exercise of their lawful powers by the Local Legislature, their criticisms and remonstrances would doubtless have received becoming attention.

As regards the Local Judicial District Act of 1879, which claims to fix the places of abode of the Judges, it is doubtful whether this is not an undue assumption of provincial authority. Under the 130th clause of the B. N. A. Act, taken in connection with clauses 96 to 100, which are made substantially applicable to British Columbia by clause 146, we may assume the Judges of the Provincial Courts to be Dominion officers. If so it would seem to appertain to Dominion authority to define their position, abode, personal service and responsibility, subject, of course, to the provisions of the Imperial Statute. But this Local Act of 1879 was virtually repealed by the Local Act of 1881, which admits the right of the Governor-General in Council to determine the residences af the Judges.

It is otherwise as regards the sphere of judicial operations and the duties of the Judges in relation thereto. These matters, as forming part of the local "administration of justice," have been advisedly subjected to the control of the Provincial Legislatures. This, I think, is evident from the Imperial Act of 1865, known as the Colonial Laws Validity Act. But independently of this Act, the decision in *Valin* v. *Langlois*, to which I have already adverted, establishes the principle that the Dominion Parliament is competent, for Dominion purposes, to prescribe additional duties to the Judges in their capacity as Dominion officers, and in the performance of such duties only to frame rules and prescribe procedure for their guidance whilst sitting as a Dominion Court, for the determination of questions affecting Canada as a whole. This exercise of authority on the part of the Dominion Parliament serves to mark with greater clearness the limits of local and federal authority over "Provincial Courts," and to confirm the view contended for in this paper as to to the right of the Local Legislature to regulate the procedure of the Courts when engaged in the administration of justice within the Province.

If, in providing for the local administration of justice, the Legislature were to enact anything that would hinder or interfere with Dominion judicature, the Governor-General in Council would naturally interpose to veto the Act. If not disallowed the Court itself would so construe the Act as to reconcile apparently conflicting jurisdictions and not permit the action of the Court when sitting for Dominion purposes, under a Dominion Statute, to be frustrated.

The Courts are sometimes required to fulfil Dominion functions in addition to their ordinary duties of administering provincial law. In the former event they are under Dominion control. In the latter they are exclusively subject to Provincial Legislation. The superior as well as the inferior Courts in all the Provinces of Canada are equally organized, constituted, maintained and regulated by provincial enactment in every respect, save only when they are required by special Dominion law to undertake certain exceptional duties on behalf of the Dominion. The position of the Courts towards the Local Legislature is in no wise affected by the consideration that the Judges themselves are appointed by Dominion authority, and are personally amenable to the jurisdiction of the Dominion Parliament. The position of the Judges, however anomalous at first sight it may appear, is analogous to that of the provincial Lieutenant-Governors, who, though appointed by the Governor-General and subject to his instructions, are nevertheless limited to a sphere of duty which is essentially provincial.

Further reasons of public policy might be adduced in support of the arguments urged in this paper, but enough has probably been said to justify the interpretations I have endeavoured to put upon so much of the B.N.A. Act as comes under review in the decision of the Supreme Court of British Columbia upon the *Thrasher Case*.

ALPHEUS TODD.

Ottawa, 21st April, 1882.

LAW STUDENTS' DEPARTMENT

The following are the dates of Examinations as recently fixed by the Benchers:

Junior Class	May 2.
Graduates or Matriculants of Universities	May 4.
First Intermediate	May 9.
Second Intermediate	May 11.
For Solicitors	May 9.
For Call	May 11.

EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.

Anson on Contracts and Statutes.

1. State the characteristics of a judgment, distinguishing it from a simple contract.

2. Distinguish between *good* and *valuable* consideration, and state what you know as to the necessity of the existence of one or other of them to support a contract.

3. Can a contract made with a foreign sovereign be enforced by or against him in our Courts? Answer fully.

4. Give an example of a contract made void by mistake as to the nature of the transaction.

5. Point out different ways in which a contract may be discharged.

6. State broadly the distinction between the authority of a special agent and that of a general agent.

7. Of what facts does our statute law make the protest of a bill of exchange evidence?

SECOND INTERMEDIATE.

Williams on Personal Property—Ontario Judicature Act.

1. Mention some of the chief points in which personal property differs from real property.

2. "A grant cannot be made of that in which a man has no actual or potential property." Explain and illustrate this statement.

3. What is the effect of a grant of a chattel to A for his life, and after his death to B? Will the nature of the chattel make any difference? Explain fully.

4. What are the liabilites of an executor *de son tort?* and how are they created?

5. Distinguish between set off, as it existed before the Judicature Act, and counter claim, under that Act.

6. Can an action for the recovery of land be joined with any other cause of action under the Judicature Act? Answer fully, giving grounds for your answer.

7. What remedy is provided under the Judicature Act for cases in which causes of action are joined, which cannot conveniently be tried together?

SECOND INTERMEDIATE.

Equity Jurisprudence.

1. Give illustrations of the forms of words of recommendation in a will which will be construed as imperative.

2. Give illustrations of cases where the satisfaction of legacies will be held to be secured by subsequent legacies.

3. Give examples of assignments and contracts which equity will not enforce as being against public policy.

4. How does the Court deal with a case where a mortgagee pursues all his remedies concurrently?

5. In what cases will equity interfere to rectify antenuptial settlements?

6. Who may be the guardians to an infant?

7. How far will a Court enforce the performance of a representation of (1) an existing fact by, or (2) the intention of, a party?

EXAMINATION FOR CALL.

Real Property and Wills.

1. A person living in Montreal, owning real property and chattels situate in Ontario, dies in Montreal, leaving a will sufficient by the Quebec law to pass real estate, but insufficient by the laws of Ontario for that purpose; it is sufficient by the laws of Ontario to pass personalty, but insufficient by the law of Quebec. How should his estate in Ontario be distributed? Give your reasons.

2. A devise of lands is made "to A. and his heirs general." A. is a bastard, and can therefore have heirs of his body only. What estate in the land does he take?

3. Is a gift to build a charitable institution void under the Statutes of Mortmain (a) where the land on which the building is to be erected is already in Mortmain, (b) where the land is to be supplied from some other source after the testators death? Answer as fully and particularly as you can.

4. In a contract of sale of lands, what is the rule as to payment of interest on the purchase money, when there is no special agreement as to interest, (i.) where a time is fixed for the completion of the contract; and (ii.) where no time is fixed for its completion?

5. Can a mortgagor compel his mortgagee to produce any of the title deeds before paying him off? If so, state what deeds and during what period.

6. A. owns lot 1, and has a right of way over an adjoining piece of land. He makes a conveyance of lot 1 to B. pursuant to the Short Forms Act, which contains no express grant or conveyance of the right of way. Does it pass? Give your reasons

7. Is registration of an assignment of mortgage simply, sufficient notice thereof to the mortgagor?

8. Can the vendor of land by auction attend at the sale and bid for the land so as to prevent a sacrifice of of it?

9, What is implied by the use of the word "grant" in a deed?

10. A. is one of the witnesses to a will, by which there is bequeathed to his wife a legacy to her sole and separate use. Is her right to the legacy in any degree affected?

BOOK REVIEW.

PRINCIPLES OF THE LAW OF REAL PROPERTY, intended as a First Book for the use of students in conveyancing. By Joshua Williams, Esq., of Lincoln's Inn, Q.C. Adapted to the Laws in force in Ontario by Alexander Leith, Q.C. Toronto: Rowsell & Hutchison, 1881

Mr. Leith's adaptation of Williams' well known and admirable work on the principles of Real Property Law supplies a long felt *desideratum*, and materially increases the debt of gratitude which is already due to the author for his former works in the same department. It is unnecessary for us to say anything in praise of Williams' "First Book," a work whose pleasant style and lucid exposition have guided so many generations of "students in conveyancing" in their arduous search after the principles of real property law. It will be generally admitted that few works have better realized the hope expressed by its author in the preface to his first edition, that he might be the "means of bringing the minds of such beginners as may peruse his pages to that tone of quiet perseverance which alone can enable them to grapple with the increasing difficulties" of his subject. Those very beginners, however, who have profited so much by the English work, have hitherto had to complain of a serious drawback to its usefulness—the fact, namely, that they were compelled in their study of its pages to learn a great deal which they immediately afterwards found it necessary to unlearn, or at all events, expedient to forget, as being inapplicable to or entirely different from Ontario law. The most experienced lawyer is compelled to recognize a difficulty of this kind in his study of English cases and text-books—how much more then must it be felt by the tyros who have year after year been preparing themselves for their "first intermediate" by laboriously "getting up" the old Law of Descent, the Stamp Acts, and the learning of advowsons and copyholds! Mr. Leith has in the work before us done much to remove this stumbling-block from a path which under the most favourable circumstances must be a somewhat thorny one, by expunging from the English work what is useless in Ontario, and inserting the law peculiar to this Province. We cannot, however, help regretting a defect, of which Mr. Leith's preface shows that he himself is conscious—we refer to the few and meagre references made to Canadian cases. The fact of the author's absence from Ontario during the preparation of the work is doubtless the reason for any deficiency in this respect. We could wish also that he had not included in his list of omissions from the English work such valuable features as the Table of Cases and List of Statutes Cited, and trust that they will not be forgotten when the book reaches a second edition. When their due weight, however, has been allowed to these and to other defects which the critical eye may discover, it will not be the less true that this little work will be of the greatest service to those for whose use it is designed, the beginners, whose primary necessity is a clear and concise exposition of elementary principles, and not a premature exploration of the wilderness of Case and Statute Law. In the interest of that large and important class, we venture to express the hope that the Legal Education Committee will see fit to substitute the Canadian adaptation of Williams for its English original in the curriculum of legal studies. We have but to add that the publishers have done their part well in the excellent typographical execution of the volume, which strikes us as being, in this respect, decidedly above the average of Canadian publications.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The right of stoppage in transit.—*Central L. J.*, March 31.

Will or no will.—*Ib.*

Telegrams as evidence.—*Ib.*, April 7.

Does stipulation for attorney's fee render a promissory note non-negotiable.—*Ib.*

Should a Judge practice in a court in which the judge is his near kinsman.—*Ib.*

Presumptions of life, death and survivorship.—*Irish L. T.*, March 11, 18, April 1, 8.

The reform of legal procedure (From the *Times*).—*Ib.* March 11, 18.

Parisian law student life (From *N. Y. Times*).—*Ib.*, March 18.

Limitation of penal actions (From the *Justice of the Peace*.—*Ib.*, April 1.

Injuries to infants.—*Central L. J.*, April 14.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

BILLS OF EXCHANGE :—

A Digest of the Law of Bills of Exchange, Promissory Notes and Cheques: by M. D. Chalmers, M.A. Ed. 2. Stevens & Sons: London: 1881. 1 Vol.

BRACTON :—

Henrici de Bracton de legibus et consuetudinibus Anglio. Edited by Sir Travers Twiss, Q.C., D.C.L. Published by the authority of the Lords Commissioners of Her Majesty' Treasury, under the direction of the Master of the Rolls. Vol. 4. London: 1881.

COMPANIES :—

A summary of the Law of Companies, by T. Eustace Smith. Ed. 2. Stevens & Haynes: London: 1871. 1 Vol.

COMPANIES :—

Company precedents for use in relation to Companies subject to the Companies Acts, 1862 to 1880, with copious notes, by F. B. Palmer. Ed. 2. Stevens & Sons: London: 1881. 1 Vol.

CONVEYANCING :—

Prideaux's Precedents in Conveyancing; with dissertations on its Law and Practice. Ed. 11. By F. Prideaux and J. Whitcombe. Stevens & Sons: London: 1882. 2 Vols.

DIGEST :—

An analytical digest of the cases published in the New Series of the Law Journal Reports and other contemporary reports from Mich. Sittings, 1875, to Trinity Sittings 1880, with references to the statutes passed during the same period: by Cecil C. M. Dale, Esq., assisted by George A. Streeten: E. B. Ince: London: 1881. 1 Vol.

FIXTURES :—

The Law of Fixtures in the principal relation of landlord and tenant, and in all the other or general relations, showing also the precise effects of the various modern statutes upon the subject, and incorporating the principal American decisions: by Archibald Brown. Ed. 4. Stevens & Haynes: London: 1881. 1 Vol.

SALE OF GOODS :—

The law relating to the sale of goods and commercial agency: by Robert Campbell, M.A. Stevens & Haynes: London: 1881.

STATUTES :—

Chitty's Collection of Statutes of Practical Utility, arranged in alphabetical and chronological order, with notes thereon. Ed. 4. Containing the statutes and cases down to the end of the second session of the year 1880: by J. M. Lely, Esq. Henry Sweet: London: 1880. 6 Vols.

FLOTSAM AND JETSAM.

The following, we need scarcely say, comes from Ireland :—

> Every process server shall before service compare the copies of the civil bills delivered to him for service with their respective originals, and *prior to the service of such copies* endorse his name upon the original, the time when, the manner in which, and the place where such service was made, and the person (whether relative or servant) on whom the same was served.

The extract is from 'Rules for the Guidance of Process Servers,' issued by the clerk of the peace for County Clare. After this we should think that process servers will give up the business in despair. The Court, whose officer he is, appears to be harder upon him than even the defendant and his sympathising friends are said sometimes to be. A man may escape being made to eat the writ he is serving, but how can any merely human process server record the details of an event before it happens?—*Law Journal.*

The head-note to *Smith* v. *The Great Eastern Railway Company*, L. R. 2 C. P., runs as follows :—

> The plaintiff was bitten by a stray dog at a railway station while waiting for a train. It was proved that, at 9 p.m., the dog flew at and tore the dress of another female on the platform; that, at 10.30, he attacked a cat in the signal box near the station, when the porter there kicked him out and saw no more of him, and that he made his appearance again at 10.40 on the platform, where he bit the plaintiff. Held no evidence to warrant a jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers.

In this inimitable tale it is difficult to know which most to admire—the rapidity with which the hero changes his sex, being first a dog, then attacking 'another female,' and then again a 'he;' or the punctuality of this dog, putting to shame the best express train of the company which so basely repudiated him, or the anticlimax, by which, after all this graphic history of tearing, cat-baiting, and kicking, no one has to pay for it. —*Law Journal.*

Canada Law Journal.

VOL. XVIII. MAY 15, 1882. NO. 10.

DIARY FOR MAY.

18. Thurs. D. A. Macdonald, Lieut.-Governor Ontario, 1875. Ascension Day.
21. Sun... *First Sunday after Ascension.* Confederation of B. N. A. Provinces proclaimed, 1867.
22. Mon.. Lord Dufferin, Gov.-General, 1872.
24. Wed... Queen's Birthday, 1819. Ferguson, V.C., appointed, 1881.
28. Sun... *Whit-Sunday.*
29. Mon.. Battle of Sackett's Harbour, 1813.
30 Tue... Proudfoot, V.C., appointed, 1874.

TORONTO, MAY 15, 1882.

WE have received several numbers of the *Australian Law Times*, published at 74 Chancery Lane, Melbourne. It is pleasant thus to hear from time to time from the land of our noble sister. The numbers are, to a large extent, occupied with short reports of current cases, similar to our Notes of Canadian Cases, and for the rest appear chiefly to comprise selections from contemporary law publications. The whole is very well printed, and on good paper, but each fortnightly number contains far less matter than we are able to give to our readers, yet the subscription per annum is just double what ours is. In the issue of September 3rd last, we notice an interesting editoral on "The Rights of Depositors in Building Societies in Victoria." The writer begins by referring at length to the decision of the English Court of Appeal in the case of *Chapleo* v. *The Brunswick Permanent Building Society*, L. R. 5 C. P. D. 331. This was an action brought by the plaintiffs against the Society and six of the directors, to recover moneys paid to and received by the secretary in excess of the limits on borrowing prescribed by law. The secretary having absconded with these moneys, the directors repudiated for themselves and the Society all liability to the plaintiff for the the sums thus mis-appropriated. The Court of Appeal exonerated the funds of the Society, but decided in favour of the personal liability of the directors. It would appear further, that in the opinion of the Court, if the secretary, in accepting loans contrary to the rules of the association, had acted apart from the authorization of the directors, express or implied, these latter also would be exempt from responsibility. Thus, as the *Australian Law Times* observes, a depositor or insurer, after paying for years his deposit or premium, may be suddenly told that the society was all along prohibited from doing business on the terms held out to him, and may then discover that except as against the ignorant or fraudulent official who attended to him, he is left absolutely without redress. It appears, however, that by sec. 25 of the Victorian Act, No. 493, it is provided that "any member or other person depositing or lending money with or to any Society under this Act shall not be bound to see to the application thereof, or that the Society has not exceeded its borrowing limit." This, the *Australian Law Times* considers, would protect depositors in Victoria from the responsibility laid upon by such a state of law as that enunciated in *Chapleo* v. *The Brunswick Permanent Building Society*. Now secs. 41 and 42 of our Act respecting Building Societies, R. S. O. c. 164, limits the amount to which such Societies may borrow money. But neither this act nor the amending acts appear to contain any provision similar to the Victoria enactment above mentioned, and it may be worth the while of our legislature to consider this matter.

SUNDAY LAWS—WORKS OF NECESSITY.

The Judges of the Common Pleas Division have just decided in *Regina* v. *Taylor*, that it is unlawful for an ordinary barber to shave his customers upon Sunday; and this on the ground that he is a workman within the meaning of the Lord's Day Act (R. S. O. ch. 189, sec. 1.), and the shaving is a worldly labour or work done by him in the course of his ordinary calling as a barber, and is not a work of necessity or charity. Their Lordships were not prepared to say that a barber connected with an hotel would not be permitted to shave on the sacred day; for in such a case he might be looked upon as a servant kept in a private family to do work on Sundays as well as other days. The Court considered the Scotch case of *Phillips* v. *Innes*, 4 C. & F. 234, decided in 1837, and in which the House of Lords declared shaving on Sunday by a barber not a work of necessity or mercy, a binding decision.

The subject is not only an important, but also an interesting one. It as been considered by several Courts on the other side of the line. In *Commonwealth* v. *Jacobus*, 1 Penn. Leg. Gaz. Rep. 491, it was held that the business of a barber in shaving his customers on Sunday morning is "worldly employment," not "a work of necessity or charity." The Court said: "It is argued that as the law does not forbid a person to wash and shave himself on Sunday, and thus to prepare himself to attend public worship, or otherwise properly to enjoy the rest and recuperation which it was the purpose of the day to give, therefore, another may do it for him without incurring the condemnation of the law. This view is not sustained by the authorities. * * * It is further contended by the counsel for the defendant, that long-continued usage and customs of society, prove that the business of a barber is by common consent considered a necessity within the meaning of the law. * * * But is it a work of necessity? Many persons shave themselves on that day, who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber." In this case Jacobus shut up his "tonsorial parlour" at ten o'clock on Sunday morning; the Court thought that made no difference, and added, "if the closing of these shops on Sundays is an inconvenience to the public, the remedy rests with the Legislature and not with the Court.

Lord Brougham, by the way, in *Phillips* v. *Innes*, seemed to think that the shaving might be done in Dundee on Saturday, as the Glasgow people did it then. The magistrates of Dundee had held that shaving on the Sabbath was right, although it was "not lawful for the barber to work in the making of wigs on Sunday."

In another case in Pennsylvania, it was held to be illegal for a barber to shave on Sunday, even those who were sick on Saturday and could not come on that day to be cleansed; and the fact that he did not charge for his labour is considered no excuse. (*Commonwealth* v. *Williams*, Pearson's Decisions, p. 61.) Even so late as the middle of the eighteenth century "ministers were sometimes libelled" in Scotland "for shaving" themselves on the Lord's day. (Buckle, vol. iii., ch. iv., note 183.

On the other hand, a barber at Tunbridge Wells was summoned for infringing the Act of Charles II., and he ingenioulsy pleaded that if any of his customers had no money, they were shaved for nothing, thus making "the operation a work of charity," and further, that if a footman or waiter were not shaved on Sundays he would probably be discharged, and to serve him was therefore "a necessity." This satisfied the magistrate and the summons was destroyed. (The *Graphic*, Nov. 27th, 1879.)

And in Tennessee, a couple of years ago, it was held that keeping open a barber's shop

on Sunday is not indictable either as a misdemeanor or a nuisance. It was held not to be a misdemeanor, because a penalty for the violation of the Sunday laws is imposed. The question then was, whether it was a nuisance, and the Court said: "It cannot be said that a barber's shop is something which incommodes or annoys, or which produces inconvenience or damage to others. On the contrary, the business of barbering is so essential to the comfort and convenience of the inhabitants of a town or city, that it may be regarded as a necessary occupation. To hold that it becomes a nuisance when carried on on Sunday, is a perversion of the term "nuisance." All that can be said of it is, that when prosecuted on Sunday it is a violation of the statute, and subject to be proceeded against as prescribed by law, but not subject to be indicted as a nuisance. It may shock the moral sense of a portion of the community, to see the barber carrying on his business with open doors on Sunday, but it produces no inconvenience or damage to others, and, therefore, cannot be regarded in legal contemplation "a nuisance." (*State* v. *Lorry*, 7 Baxt. 95.),

It appears that every State in the union, except Louisiana, has a Sunday law; the original and model of most of them is the English Statute of 1676, passed when Charles II. was king. The laws differ greatly, therefore do the decisions; but the general principal of all is the same; ordinary business and labour is forbidden, except works of necessity and charity. In some of the statutes the laws contain special provisions against what we may assume to be the besetting sins of the inhabitants. The Askansas Statute punishes Sunday indulgence in brag, bluff, poker, seven-up, three-up, twenty-one, thirteen cards, the odd-trick, forty-five, whist, or any other game at cards by a fine of from $25 to $50. California charges from $50 to $500 (in the shape of a fine) for attending any bull, bear, cock, or prize fight, horse race or circus; or for keeping open any gambling house, or any place of barbarous or noisy amusement, or any theatre where liquor is sold on the Lord's day. In ages gone by in England bull-baiting or bear-baiting used to cost three shillings and fourpence, and wrestling and bowling five shillings, upon Sunday, (1 Car. I.) The Florida law enacts that anyone disturbing a congregation of whites, is subject to a penalty of not more than $100; or the offender may be whipped, the stripes not to exceed the orthodox forty save one; or be imprisoned for not more than six months.

South Carolina alone sticks to the old notion of compelling people to go to church. Her statute provides, "that all persons having no reasonable or lawful excuse, on every Lord's day shall resort to some meeting or assembly of religious worship, tolerated and allowed by the laws of the state, and shall there abide orderly and soberly during the time of prayer and preaching, on pain of forfeiture, for every neglect of the same, of the sum of one dollar."

In the original Sunday-go-to-Meeting Act, that of Elizabeth, every person had to repair to his parish church every Sunday, on pain of forfeiting one shilling for each offence; and anyone over sixteen who absented himself for a month, forfeited £20 a month. (Eliz. c. 2. 23 Eliz. c. 1.)

In Indiana the act forbidding working, &c. on the day of rest, applies only to those over 14 years of age.

"Necessity" is a relative term, and the law does not mean that the work to be allowed must be "absolutely necessary." "If nothing but absolute necessity were intended, it would, in general, be unlawful to prepare a meal on the Sabbath, because it might without difficulty be previously prepared, or most people might safely enough fast for twenty-four hours. To supply gas light would be equally unlawful, for people might use candles previously provided, or might retire to bed at twilight."

The great object of all these laws is to make the day a day of rest; but some things

are more important and necessary than even *rest*: and the doing of such things when indispensable is allowed. So, it was held that the seasonable preparation of breakfast for her employer's family was such a work of necessity, as justified a maid-servant in travelling on Sunday morning (*Crossman* v. *Lyon*, 121 Mass. 301); and a servant man may drive his master's household to church in his master's carriage (*Com.* v. *Nesbit*, 24 Penn. St. 398). In fact "the law has never been regarded as applying to the proper internal economy of the family. It does not except the ordinary employment of making fires and beds, cleaning up chambers and fire-places, washing dishes, feeding cattle, and harnessing horses for going to church, because these were never regarded as the worldly business of the family, and therefore not forbidden to the head of the family, or to any of the domestics."

In Pennsylvania it was held unlawful to run street cars on Sunday (*Com.* v. *Jeandell*, 2 Gr. Pa. Cas. 506.), or an omnibus (*Com.* v. *Johnston*, 22 Pa. St. 102), even if the omnibus is used partly by church-goers it will not help the case. Still, "if an invalid, or a person immersed for six days within the close walls of a city, requires a ride into the country as a means of recuperation, which is the true idea of rest; there is nothing in the act of 1794 to forbid the employment of a driver, horses and carriages on Sunday to accomplish it. Equally lawful is the employment of the same means to go to the church of ones choice, or to visit the grave of the loved and lost to pay the tribute of a tear." (*Com.* v. *Johnston*, sup.) In Georgia, however, it was recently decided that the running of street cars in cities and their vicinity is a work of necessity (*Angusta and S. R.R.* v. *Renz*, 55 Ga. 126.)

Apropos, of the labour of domestic servants. A doctor's boy, having declined to wash his master's gig on Sunday, had the pleasure of drawing forth from the judge of the Aberdeen and Kincardine Small Debt Court the following remarks:—"It is essential to bear in mind that in determining what is a work of necessity in a domestic establishment, a great deal must be left to the discretion of the master. Life would be intolerable in a house in which the servants were to refuse to do a certain piece of ordinary work on a Sunday, which their employer thought necessary, on the ground that they were of a different opinion. The Sunday work which a master may insist upon having done, must be reasonably incidental to work that is necessary. For example, I should hesitate to hold that the master was entitled to insist that Sunday should be the weekly washing day, or the day on which the silver plate, not in daily use, was to have its periodical scrubbing. On the other hand, a servant would be bound to see that such things as are in use at every meal are cleaned, even although that involve the operation of cleaning being done between the first Sunday meal and the second." The judge held that the boy should have obeyed his master, and that he was not excused by having offered on Sunday night to clean it. (*Scottish Law Magazine*, 1880). Even the 29 Car. II. allowed the dressing of meat in families, inns, cook-shops, or victualling houses, and the crying of milk on a Sunday in the morning and evening.

The "necessity" intended is "not a personal necessity, but one arising out of the nature of the thing to be accomplished and the need of the community." Poverty and the need of money is no excuse for working on the Sabbath. What a farmer may do in one State he may not do in another; and what he may or may not do is sometimes very doubtful.

In Indiana a man may lawfully feed his hogs on Sunday; and, if according to the practice of good husbandry, it be necessary for him to gather the feed in the field and haul it to the feeding-place on that day, he may do it all without incurring any pains or penalties (*Edgerton* v. *State*, 67 Ind. 588). An honest yeoman may gather in his grain on the Sabbath day, if by leaving it in the field

until Monday it is likely to be spoiled; progathered his wheat into his garner sooner than he did (*Turner* v. *State*, 67 Ind. 595). In that State, too, he can pick and haul to market his water melons—as a work of necessity—if otherwise they would spoil (*Wilkinson* v. *State*, 59 Ind. 416). (The need of the community for water melons must be great!) It appeared from the evidence in this case that Wilkinson was prosecuted for drawing a load of 100 melons to market on a Sunday. On that day he had over 600 dead ripe and ready for market, and he lost all except the one load he marketed. Judge Hawk, in giving judgment on an appeal from the conviction for Sabbath breaking, said: "It would seem that a kind Providence had crowned the labours of the appellant with a bountiful harvest of melons. They were ripening and decaying much faster than he could get them to the market, twenty-six miles off." The learned judge then gave his ideas on water melons and works of necessity: "A ripe water melon in its season is a luxury; but there is nothing more stale, flat and unprofitable than a decayed or rotten melon. It seems to us that it was his duty as a prudent and careful husbandman to labour diligently to get as many of his melons as he could to market Whatever was his duty to do in the premises, there was a moral necessity for him to do; and in the accomplishment of the main purpose of saving and securing the benefits of his crops, whatever labour he was reasonably required to do on Sunday must be regarded, as it seems to us, a work of necessity." The judge further remarked: "It is no desecration of the Sabbath to garner and secure on that day the fruits of the earth, which would otherwise decay and be wasted. It is not necessary for the protection of the Sabbath that men should abuse or overwork either themselves or their horses by midnight work."

Yet down in Arkansas (see above as to some of the provisions of their Sunday laws) their was a poor farmer named Goff, whose wheat was wasting from over-ripeness; but he had no cradle wherewith to cut it, and he waited to borrow one until Saturday night, as his poverty compelled him to work for his neighbours during the week. On Sunday he cut his own grain with the borrowed implement. The Court decided that there was no general necessity that wheat should be cut on Sunday, therefore no one might do it, and that the poor man was not justified in breaking the Sabbath (*State* v. *Goff*, 20 Ark. 289). The disciples of the Man of Nazareth, who not only gathered but also threshed the wheat for their daily bread on the Sabbath day, would have had small chance of an acquittal before this Court; as little chance as any of them would have had if he had been in the poor shoemaker's boots in Massachusetts. This wretched mortal had a garden patch where ill weeds had grown apace. For days he could not get away from his master's shop; at last he got a two days' holiday—Friday and Saturday. He worked hard at his crops, even by moonlight, until late on Saturday night. When he ceased a few hills remained unfinished, in a very bad condition and suffering from want of hoeing. On Sunday morning, about eight o'clock, he spent half an hour in finishing these hills of corn. He was convicted for breaking the Sabbath, and the Court, on appeal, sustained the conviction. (*Com.* v. *Josselyn*, 91 Mass., 411; see also *Com.* v. *Sampson*, 97 Mass., 407.) The judges in this case must have belonged to that school of the Rabbis which insisted that it was a sin to eat an egg laid upon the seventh day; or have been lineally descended from the members of the Kirk session of Humbie, who cited poor Margaret Brotherstone before them "for that she did water her kaill upon the Sabbath day," and ordered her, she having confessed her sin, "to give evidence in public of her repentance the next Lord's day." (Buckle, vol. iii., chap. iv., note 182).

In Indiana (and even in Vermont, although the latter State is very near the unco' guid of Massachusetts), the Courts have considered

that the collecting and the boiling down of maple sap is a work of necessity on Sunday where the sap is flowing freely and all the troughs are full; the maple sugar man having no way of saving his harvest save by emptying the troughs that are full. (*Morris* v. *State*, 31 Ind. 189; *Whitcomb* v. *Gilman*, 35 Vt. 297.)

Again in liberal Indiana, the brewer is allowed to turn or handle the barley which he is manufacturing into malt for his beer, as twenty-four hours neglect would make it unfit for use. The turning is a work necessary to accomplish the object which the brewer has in view, and as the law authorizes the manufacture of beer the labour necessary to make it is lawful and a work allowable on Sunday. (*Crockett* v. *State*, 33 Ind. 416.)

In Ohio it was held that under special circumstances a miller might grind on that day. The Judge said he thought it would hardly be questioned that a gas company might supply gas, a water company water, and a dairyman milk to their customers on that day; for it is no part of the design of the law to destroy or impose ruinous restrictions upon any lawful trade or business. (*McGatrick* v. *Wason*, 4 Oh. St. 566.

Again in Indiana an inn-keeper sold cigars from a stand which was a part of his establishment, and the Court held that he was not punishable. The Judge said:—There is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any lawful habit on Sunday, the same as there is on a work-day, and whatever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the meaning of the law. It is not unlawful to keep a hotel on Sunday in the same way that it is usually kept on a week-day, and if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders and customers on a week-day, to sell cigars from the same stand in the same way on Sunday is not unlawful. There is no difference legally between the act of selling a cigar under such circumstances and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want to a customer on Sunday for pay." (*Carver* v. *State*, 69 Ind. 61.) Smokers, therefore, cannot complain.

In Alabama, as in Ontario, all shooting is forbidden if it is not justified by necessity, and shooting a dog in mere mischief is not a necessity. (*Smith* v. *State*, 50 Ala. 159.) In Missouri, however, a man went out hunting on Sunday. He was prosecuted, but acquitted as the law only forbade working on the Sabbath day; the district attorney argued that "hunting" was "working," but the Judges could not see it in that light. (*State* v. *Carpenter*, 62 Mo. 594.)

In Massachusetts it has been held that cleaning out a wheel-pit on Sunday, to prevent the stoppage of mills employing many hands, is not a work of necessity within the meaning of the law. Nor can one who helped at this work as a matter of kindness protect himself by claiming that what he did was a work of charity. (*McGrath* v. *Merwin*, 112 Mass. 467.) No wonder, when the law is such, that the poet wrote, "Alas for the rarity of Christian charity under the sun."

The consideration of works of charity must be deferred until some future time.

[See also, on above subject, *Seaman* v. *The Commonwealth*, 21 Am. Law Reg. N. S. 256.—Ed. C. L. J.]

RECENT ENGLISH DECISIONS.

The April numbers of the *Law Reports* contain a formidable quantity of cases for review, containing L. R. 7 App., pp. 1-218; 19 Ch. D., pp. 311-519; 8 Q. B. D., pp. 317 444; 7 P. D. pp. 5-20.

INTERPRETATION OF STATUTES—PROVISOES—FROM TIME TO TIME

In L. R. 7 App., pp. 1-218, the first case, *Mullins* v. *Treasurer of County of Surrey*,

contains, at p. 17, a *dictum* of Lord Penzance on the subject of statutory construction, which it may be worth while to note. Speaking of a proviso in the Imp. Prisons Act, 1877, to the effect "that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison, or otherwise which he would have been liable to pay if this Act had not passed,"—he says:—"I quite agree that provisoes are constantly inserted in Acts of Parliament to protect particular interests *ex majore cautela*, and that you must not always expect to find that if the proviso had not been there, an effect would have been produced contrary to or different from the effect that is produced by the proviso being there; in other words yon must not always expect to find that the proviso was necessary."

The next case, *Lawrie* v. *Lees*, p. 19, involves several points, one of them (i) having reference to the interpretation of statutes. A certain Private Estate Act, relating to the estate of a certain lunatic, who was partner in a brewery business, provided that the Lord Chancellor might "from time to time" order or direct to be done, in relation to the said business and the affairs or concerns thereof, all and whatsoever the said lunatic, if of sound mind, might do. It was objected that the Lord Chancellor, instead of making a separate order upon every occasion when a public-house had to be let, in the carrying on of the business, had made a compendious order giving power to the committees to execute leases on behalf of the lunatic, whenever those leases were approved of by the other partners in the brewery, and whenever they have received the sanction of the master in lunacy. All the Lords who spoke in the case, held against such a construction. Lord Penzance said: "The words "from time to time," are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. The meaning of the words "from time to time," is that after he has made one order, he may make a fresh order to add something to it, or take something from it, or reverse it altogether: and as that meaning gives sufficient force to the words and explains the use of them here, it seems to me that your Lordships ought not to go further, and to narrow these words by any construction which would throw impediments in the way of carrying on the business, whereas the object of the Act was to facilitate it."

VENDOR AND PURCHASER—CONDITIONS OF SALE.

Another point, which arose in *Lawrie* v. *Lees*, was as to the proper mode of execution of a deed by committees on behalf of a lunatic, but the principal question was (ii.) the effect of the following condition of sale of a leasehold property: "The production of the last receipt for rent paid shall be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants, * * or the waiver of any breaches of same covenants up to the time of the completion of the purchase, whether the lessor shall be cognizant of such breaches (if any) or not.' Specific performance of the contract for sale had been decreed, with a reference to enquire (1) whether a good title could be made, and if so. (2) when it was first shewn that such good title could be made. This was not appealed from, but on the Chief Clerk certifying that a good title had not been shewn, the vendor took out a summons to vary the certificate, when the present proceedings arose. The House of Lords held that whatever might be urged as to the inequitable character of the above condition as a reason why the Court should not decree specific performance of the contract, yet, specific performance having been decreed, and not appealed from, all that had to be done was to see that a good title was made under that contract and subject to its conditions. But Lord Penzance took occasion to observe, p. 31, that in what-

ever suit the question arose,—"Where the language is plain and therefore no real question of construction arises, I think the Court is bound to execute the contract as it finds it, and if it presses hardly upon one party or the other the answer is that that party entered into it with his eyes open." And he said that the substance of a condition of the above kind appeared to him to be this:—"In making the bargain the purchaser agrees—'I will not raise any question about broken covenants. I will run my risk of any forfeiture of my lease that may be incurred in respect of them. If there has been any breach I do not think it is likely that it will be pressed, but I will take the chance of that.' I think that is the object with which a vendor inserts these conditions on a sale, and that is the object with which a purchaser agrees to such a condition. He takes upon himself the chance of whether there has been a breach, and if there has whether a forfeiture can be enforced."

FORM OF ORDER FOR SPECIFIC PERFORMANCE.

Another point, which arose in *Lawrie* v. *Lees*, (iii.) concerned the form of order. It was objected that the order directed that the plaintiff should pay, and that upon his paying the defendant should execute an assignment, without directing that these two things should be cotemporaneous. But the House held that the proper way to construe such an order was that these should be reciprocal matters which would have to be done cotemporaneously—that one party wss not bound to pay until the other party was ready to execute the assignment, and that the one was not bound to execute the assignment until the other was ready to pay.

REHEARING AFTER DECREE FOR SPECIFIC PERFORMANCE.

Lastly, Lord Blackburn observes, (iv.) at p. 36, and Lord Watson speaks to the same effect, as follows:—"I think it might happen that, there having been a decree of this kind, (specific performance), whilst investigating the title the parties might discover for the first time that there was really a substantial objection to specific performance; and it certainly would be very reasonable in such a case that it should be said. The Court will give a rehearing and see whether it does go to specific performance or not. Such a case might arise, and if the Court did grant a rehearing the Court would take evidence upon it." And after alluding to the objection that had been raised, that the breach of covenant, which had taken place in this place, was a continuing breach, and that, therefore, though the title would, under the above condition, be good unto completion of the contract, yet the day afterwards there would be an infirmity which might interfere with it, he said:—"I think that point ought to have been brought forward either before the decree was made for specific performance, or if as is suggested it was discovered for the first time afterwards, by getting a rehearing, and I think evidence would be taken on all sides to see whether this was a sort of objection which ought to prevail."

B. N. A ACT—DISTRIBUTION OF LEGISLATIVE POWER.

The next case requiring notice, *The Citizens Insurance Co.* v. *Parsons*, p. 97, will probably be conceded to be one of the most important decisions yet delivered by the Privy Council with reference to the British North America Act. The judgment first points out that notwithstanding the declarations in sect. 91, that "the *exclusive* legislative authority of the Parliament of Canada, extends to all matters coming within the classes of subject" therein enumerated, and that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," it is obvious from a comparison of the contents of the two sections, that the legislature could not have intended that the rule thus laid down should in all cases apply, for in some cases the powers exclusively assigned to the provincial legislatures in sect.

92, come clearly within one or other of the general classes of subjects expressly assigned in sect. 91 to the Dominion parliament, as *e. g.* "the solemnization of marriage" comes within "marriage and divorce." It then goes on to discuss what is meant by "property and civil rights in the province," in sect. 92, subs. 13, the result come to being that it must not be confined to such rights as flow from the law, *e. g.* the statutes of persons, but includes also rights arising from contract, excepting, of course, that class of contracts specially enumerated in sect. 91, viz.: "bills of exchange and promissory notes." It then proceeds to discuss the meaning of the words "the regulation of trade and commerce" in sect. 91. The conclusion come to is that the context shows that regulations relating to general trade and commerce were in the mind of the legislature, and they were not referring to rules for regulating particular trades. The words rightly understood include "political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion." The immediate result arrived at, is that Ont. 39 Vict. c. 24 requiring certain conditions to form part of policies of insurance entered into or in force in Ontario is not *ultra vires*, no matter whence the insurance company affected may have derived its corporate powers. It only requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions. But the more important result of the reasoning in the judgment would appear to be that it points to three simple propositions with reference to the powers of the Dominion parliament and the provincial legislatures respectively in reference to the incorporation of companies, viz.: (i.) the Dominion parliament alone has the right to create a corporation to carry on business throughout the Dominion,—and it has this right by virtue of its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, the only subject on this head assigned to the provincial legislatures being "the incorporation of companies with provincial objects." (ii.) Nevertheless each provincial legislature has the power to regulate the contracts of such Dominion companies, within the limits of its province; this it has by virtue of its exclusive legislative power over "property and civil rights in the province." (iii.) Each provincial legislature has authority to incorporate companies with power to carry on business within the limits of the province; this it has by virtue of its power over "the incorporation of companies with provincial objects."

It was also decided in this case that according to the true construction of the said Ontario Act, 39 Vict. c. 24, whatever may be the conditions sought to be imposed by insurance companies no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act.

The next case requiring notice is also an important case on the British North America Act, viz., *Dobie* v. *The Temporalities Board*, p. 137. The judgment in this case lays down the proposition that the power conferred by section 129 of the B. N. A. Act upon the provincial legislatures to repeal and alter the statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other classes of the Act, and therefore in order to ascertain how far any Provincial Legislature has power to alter and amend an Act of the old Parliament of Canada it is necessary to revert to sects. 91 and 92 of the B. N. A. Act. Moreover, at p. 149 we find the following given as principles established by the judgment in *Citizens Ins. Co.* v. *Par-*

sons:—"The first step to be taken with a view to test the validity of an Act of the provincial legislature is to consider whether the subject matter of the Act falls within any of the classes of subjects enumerated in sect. 92. If it does not then the Act is of no validity. If it does then these further questions may arise, viz., whether, notwithstanding that it is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne."

B. N. A. ACT, SECT. 108.

The next case calling for notice, *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.*, p. 178, is also a decision under the B. N. A. Act, but it appears only necessary to say that the principle it establishes is that though sect. 108, which enacts that the public works and property of each Province, enumerated in Sched. 3 to the Act, shall be the property of Canada, had the effect of transferring to the Dominion of Canada all railways which were the property of the separate provinces, yet it had not the effect of vesting in Canada any other or larger interest in those railways than that which belonged to the Province at the time of the statutory transfer.

AMENDING PROBATE -FROM AND AFTER DECEASE OF WIFE —VESTING.

The last case in this number, *Rhodes* v. *Rhodes*, p. 192, is a will case from New Zealand. Two questions arose in it, viz. (i.) whether the plaintiff was entitled to have the probate of the will amended by having certain words contained in it omitted; (ii.) as to the proper construction of certain clauses in the will. As to (i.) it appeared that the person who drew the will, on general instructiosn from the testator, inserted certain words in it for no particular reason, except that he thought they would come in an ordinary will. The effect of these words, it was said was to change the whole effect of the subsequent part of the will, and so defeat the testator's intentions. The will was afterwards read over to the testator, he being then of disposing mind, but very ill, and he executed it, having confidence in the draughtsman, though it was impossible to suppose that he had an intelligent appreciation of the effect of these words at all. Their Lordships, however, held that "there is no difference between the words which a testator himself uses in drawing up the will, and the words which are *bona fide* used by one whom he trusts to draw it up for him. In either case there is a great risk that words may be used that do not express the intention. There probably are very few wills in which it might not be contended that words have been so used. However this may be, the Court which has to construe the will must take the words as they find them." And they distinguish the case where a certain part of an instrument purporting to be a will has been inserted by fraud, and where this part, being "so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the statute of wills, the execution of what was shewn to be the true will, and something more, may be treated as the execution of the true will alone." (ii.) The point of construction in question was as follows:—The testator, after making certain dispositions in favour of his wife, and others, not affecting the question at issue, directed that *from and after the decease of his said wife* without leaving issue of his said marriage, his trustees should stand possessed of all the undisposed of residue of his real and personal estate in trust for his daughter for and during the term of her natural life, with further provision in case of her death or marriage. The daughter now claimed that it might be declared that she was entitled, under the will, to the *immediate* possession and enjoyment of the moneys arising and to arise from the residuary estate, though the wife of the testator was still living. As to this the Privy

Council in their judgment, begin by adopting in its integrity the rule as enunciated by Lord Cranworth in *Thelluson* v. *Rendlesham*, 7 H.L. C. at p. 494, as that "universally recognised and acted on," namely, "that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense." "Lord Cranworth," their Lordships say, p. 205, "seems quite correct when he says that the latter branch of the rule is but a means by the context of shewing that the words were not used in their ordinary sense, as it is not to be presumed that the testator meant an absurdity; but that if it is shewn that it was intended to use them so as to work this absurdity, that intention, if it be not illegal, must be carried out. * * * Starting with this as the rule of law, it seems that the question now raised is whether there is an indication of intention on the whole will that certain interests should be vested immediately on the testator's death sufficiently clear to require the Court which has to construe that will to say that words which, literally understood, would express an intention to postpone the vesting of those interests till after the death of Mrs. Rhodes (the wife), must be construed as expressing an intention consistent with those interests being vested, though that intention is not that which, but for the context, would be understood from the words used in their ordinary sense, and is one which would have been more aptly expressed in other words, or whether the intention to postpone is so clearly and strongly expressed that the Court is required to give the words that effect, notwithstanding the other parts of the will, which tend to the conclusion that the intention was to vest." The Board then proceeds to examine the will at length, arriving at the conclusion that there was enough in it to produce not a mere conjecture that the intention was to make the estates vested, but to produce a conviction that this was intended, and also that the words "from and after the decease of my said wife" must be construed as referring only to property in which the widow took an interest terminable at her death, as to which the daughter's interest vested also, but subject to the life interest.

A. H. F. L.

LAW SOCIETY.

HILARY TERM, 45 VICT., 1882.

The following is the *resume* of the proceedings of the Benchers during Hilary Term, published by authority:—

During this term the following gentlemen were called to the bar, namely:—Edwin Taylour English, with honors, Adam Johnston, with honors, Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson. And the following gentlemen were called to the bar, under the rules in special cases:—Donald McMaster, Henry Gordon McKenzie.

The following gentlemen received certificates of fitness, namely:—Adam Johnston, J. Stanley Hough, J. Travers Lewis, George J. Sherry, G. S. Lynch Staunton, Edwin Taylour English, William Agutter Taylor, A. Stewart, Newenham Parke Graydon, William James Cooper, Albert Edward Wilkes, William Steers, Stewart Masson, Henry Nason, R. A. Pringle, J. C. Alguire, J. B. Humphreys, R. D. Storey, G. F. Jelfs, E. A. Foster.

The following gentlemen passed their first intermediate examination, namely:—C. A. Masten, with honors, J. Y. Criuckshank, with honors, George Weir, F. H. Keefer, S. C. Smoke, G. W. Field, H. H. Collier, A. Darrach, E. Bell, D. Armour, J. T. Sproule, W. J. Church, A. Burwash, E. W. M. Flock, E. C. Cunningham. S. O. Richards, D. W. Saunders, W. Barr, J. D. Hepburn, A. C. Muir, H. B. Elliott, J. M. Macoun, H. L. Ingles, N. McMurchy, H. Cowan, J. M. McNamara.

The following passed their second intermediate examination, namely:—G. Kappelle, with honors, J. Martin, with honors, J. L. Murphy, with honors, A. H. McAdams, T. T. Porteous, G. H. Anderson, A. P. E. Panet, J. S. Mackay, J. Carruthers, C. H. Cline, A. S. Clarke, R. Witherspoon. The case of Mr. W. A. McLean was referred to the Legal Education Committee for report.

The following gentlemen were entered on the books of the Society as Students at Law, namely:

GRADUATES.—Marcus Selwyn Snook, Stephen Johnson Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick M Bankier.

MATRICULANTS OF UNIVERSITIES.—Nelson Sharpe, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylsworth, Thomas Hislop.

JUNIOR CLASS.—Willard Snively Riggins, Allen Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Loney.

ARTICLED CLERK.—Frank Ernest Coombe was allowed his examination as an articled clerk.

Monday, February 6th.

Convocation met.

Present—The Treasurer and Messrs. Maclennan, Bethune, Ferguson, Moss, Murray, Foy, Crickmore, Irving, Mackelcan, McCarthy, Cameron, Read, J. F. Smith.

The minutes of last meeting were read.

The Committee on Legal Education, reported that Mr. I. F. Hellmuth had duly published in the Gazette the statutory notice, and that he had now complied with all the requirements of the statute and rules of the Society, and that he was entitled to his certificate of fitness on payment of the ordinary fees.

On motion of Mr. Crickmore, it was ordered that Mr. Hellmuth be allowed his certificate of fitness.

The Report of the Finance Committee was presented by Mr. Read, received and read, and is as follows:—

REPORT.

To the Benchers of the Law Society in Convocation.

The Finance Committee beg leave to report as follows:—

1.—On reference to the balance sheet for 1881, signed by the auditor of the Society, and lying on the table, and which shows the receipts and expenditure of the Society for 1881, it may with a little consideration and calculation be seen that the receipts of that year were $49,731.70, and that the expenditure was $71,010.09, of which last mentioned sum $32,865.88 were expended on the new building, and the residue or sum of $38,144.21 was for ordinary expenditure, by which it appears that there was a surplus on the ordinary transactions of the Society of receipts over expenditure of $11,587.49.

2.—The above mentioned expenditure on the new building was made from the balance in the bank at the credit of the Society (with petty cash in hand) on the 31st of December, 1880, of $10,784.72, the funds temporarily deposited at interest of $15,000, and from the above mentioned surplus a sum of $7,081.16, in all $32,865.88, leaving a balance out of the surplus of the year 1881, in the Bank, of $4,506.33 to the credit of the Society on the ordinary operations of the year.

3.— It will no doubt be remarked upon by the members of Convocation, that the surplus upon the ordinary transactions of the past year was much larger than usual, and they might infer that there has been a proportionately larger increase in the yearly revenue of the Society, but upon comparing the receipts of last year with those of 1880 it will be seen that, although the revenue is exceptionally large, the chief reason of the aforesaid surplus consists merely in this, that no part of the sums of $3,060 and $4,050 for the Election Case reports and the Supreme Court reports respectively, provided for in the estimates of last year's expenditure, has yet been paid.

4.—The Committee have had prepared and laid on the table, the estimates of the probable receipts and expenditure for the current year, shewing the different sources of the expected revenue and the different items of the probable expenditure, from which it will appear that the estimated aggregated receipts for the year 1882 will be $42,600, (or $7,131.70 less than those of last year), a diminution partly owing to the excessive receipts of last year, and the estimated aggregate ordinary expenditure, including the cost of an extra volume of Supreme Court reports, of the portraits of the Treasurer and Chancellor Boyd, ordered by Convocation, and the insurance for three years, will be $41,479, shewing a probable surplus of $1,121.

5.—It will appear also upon reference to the same sheet of estimates for the current year that there will be required for extraordinary expenditure the aggregate sum of $16,325, made up of $3,060 for the election case reports and of the sums estimated to be necessary for completing the new building and the heating and lighting appliances in connection therewith, and for completing and furnishing the new Convocation Room and other improvements in the old building, and for making the alteration in and fitting up and furnishing the adjuncts to the Library.

6.—To meet this $16,325 estimated for extraordinary expenditure, there is the sum of $4,506.33, the balance in the Bank and petty cash in hand at the end of the year 1881, and the above mentioned estimated surplus of $1,121 on the ordinary transactions for the current year, the residue will be taken from the $60,000 of capital invested in Dominion Stock, as was contemplated when the decision to construct the new building was reached. The Committee was authorized to withdraw the required amount during the

course of last year, but they have been able to provide for the payments up to date out of other resources, and have therefore postponed the withdrawal.

The Government has given notice to pay off the stock in September next, and it will therefore be necessary to decide on some other mode of investment for the capital before that time.

Signed, D. B. READ,
Chairman.

The estimates and balance sheet therein mentioned are as follows:

ABSTRACT OF BALANCE SHEET FOR 1881.

RECEIPTS.

Certificate and Term Fees	$16,435 75	
Less Fees returned	121 75	
		$16,314 00
Notice Fees		761 00
Attorneys' Examination Fees	6,730 00	
Less Fees returned	840 00	
		5,890 00
Students' Admission Fees	9,189 75	
Less Fees returned	808 00	
		8,381 75
Call Fees	12,310 00	
Less Fees returned	2,210 00	
		10,100 95
Interest and Dividends		4,034 00
Govennment payment for heating, lighting, etc		4,250 00
Balance		21,278 39
		$71,010 09

EXPENDITURE.

Reporting:—		
Salaries	$7,400 00	
Postage on reports	531 20	
Printing	6,762 13	
Notes of Cases	347 50	
	15,040 83	
Less reports sold	563 44	
		$14,477 39
Examinations:—		
Salaries	2,400 00	
Scholarships	2,220 00	
Printing and stationery	491 51	
Advertising	33 90	
Engrossing diplomas and certificates	5 24	
Dies and medals	589 34	
Examiners for Matriculation	339 00	
Prizes	50 00	
Law Journal account	35 00	
	6,163 99	
Less Fees received for petitions	74 00	
		6,089 99
Library:—		
Books, bindlng and repairs		3,625 49
General expenses—		
Salaries, Secretary, Sub-Treasurer and Librarian	2,000 00	
Assistants	967 27	
Housekeeper	216 00	
		3,183 27
Lighting, heating, water and insurance:—		
Engineer and assistant	560 00	
Gas	383 16	
Water	943 63	
Insurance	585 33	
Weighing coal	10 00	
Fuel	2,949 28	
Repairs to apparatus	170 40	
Carting coal and cutting wood	152 49	
		5,754 29
Grounds:—		
Gardener and assistant	400 00	
Tools and seed	6 35	
Cartage	4 75	
Labor	193 02	
Snow clearing	37 70	
Repairing side walks	44 89	
		686 71
Sundries:—		
Scrutineers, $360; Auditor, $100	460 00	
Stationery and Printing	219 12	
Advertising, $143.90; postage, $85.83	229 73	
Law costs	863 92	
Repairs, $46.18; term lunches $529.75	575 93	
County library aid	868 00	
Petty charges	32 42	
Telegraph and telephone operator	158 04	
Attendance on clocks	10 00	
Glass, $5.80; cleaning windows, brasses, etc., $48.95	54 75	
Subsidy Dom. Telegraph Co.	75 00	
Resume, $30; Guarantee Co., $12	42 00	
Ice, $10; oiling floor, $10; Detector, $2	22 00	
Address *re* C. J. Moss	25 00	
Locks, matting, etc	27 03	
Painting Benchers' rooms	41 55	
Bell Telephone Co	45 08	
Langley, Langley & Burke	400 00	
Portrait C. J. Osgoode	260 00	
Judicature Act tariff	17 50	
		4,327 07
		38,144 21
Spent in new building in 1881		32,865 88
		$71,010 09

ESTIMATES OF RECEIPTS AND EXPENDITURE FOR 1882.

RECEIPTS.

Certificate and Term Fees	$16,500 00	
Arrears, fines and costs collected	700 00	
Notice fees	650 00	
Attorneys' Examination fees	4,800 00	
Students' Admission fees	6,000 00	
Call fees	7,000 00	
Interest and Dividends	2,600 00	
Government payment for heating, lighting, etc	4,250 00	
Sundries:		
Fees on petitions, diplomas and certificates	100 00	
		$42,600 00

EXPENDITURE.

Reporting:		
Salaries	$7,400 00	
Postage	560 00	
Printing	6,220 00	
Supreme Court Reports, 2 vols	4,050 00	
Notes of Cases	350 00	
Advertising	10 00	
	18,590 00	
Less Reports sold	386 00	
		$18,204 00
Examinations:—		
Salaries	3,200 00	
Scholarships	1,600 00	
Printing and Stationery	300 00	
Advertising	50 00	
Engraving Diplomas & Certificates	25 00	
Examiners for Matriculation	325 00	
Law Journal account	100 00	
Medals	100 00	
		5,700 00
Library:—		
Books, Binding, and Repairs		2,900 00
General expenses—		
Salaries		
Secretary, Sub-Treasurer and Librarian	2,000 00	
Assistants	1,100 00	
Housekeeper, $216, $84	300 00	
		3,400 00
Lighting, heating, water and insurance:—		
Engineer and Assistant	860 00	
Gas	500 00	
Water	1,000 00	
Insurance	490 00	
Weighing Coal	10 00	
Fuel	3,300 00	
Repairs to Apparatus	200 00	
Carting Coal and Cutting Wood	100 00	
		6,460 00

LAW SOCIETY, HILARY TERM.

Grounds :—		
Gardener and Assistant	400 00	
Tools	10 00	
Carting	5 00	
Labour	200 00	
Snow Clearing	40 00	
		655 00
Sundries :—		
Auditor, $100 ; Stationery, $250	350 00	
Advertising, $50; Postages, $50; Telephone $100	200 00	
Petty expenses, $20; Telegraph Operator, $158	178 00	
Clocks, $10; Cleaning Windows, $15;	25 00	
Resume	40 00	
100 copies for Convocation	15 00	
Guarantee Premium, $20; Ice, $10	30 00	
Oiling Floor, $12 ; Directory, $3	15 00	
Detective, $3 ; P. O. Box, $4	7 00	
Law Costs, $750 ; Repairs, $200	950 00	
Term Lunches	500 00	
County Library Aid,	850 00	
Prizes	200 00	
Chancellor Boyd's Portrait and Frame	500 00	
The Treasurer's " "	300 00	
		3,300 00
Balance		2,121 00
		$42,600 00

EXTRAORDINARY EXPENDITURE.

Mr. Hodgins' book, (election reports).	$3,060 00	
Additional desks and chairs for new Examination Hall	215 00	
Fitting up adjuncts to Library	800 00	
On new building including lighting and heating	9,750 00	
Completing improvements in old building, including the new Convocation Room and furnishing the same	1,250 00	
Conversazione	1,250 00	
		$16,325 00

Ordered that the report, balance sheet and estimates be considered on February 7th.

Mr. Montgomery's petition was refused.

Mr. Alguire's petition was refused.

A letter from the City Clerk with enclosures, referring to the Osgoode Hall grounds, was referred to the Finance Committee to consider and report.

A letter from Mr. Hector was read. Ordered that Mr. Hector be allowed to examine the records bearing on the subject of his letter for the indicated purpose.

Mr. Germon's letter referring to his examination fee was referred to the Finance Committee.

The letters of Messrs. Freeman and Goodwillie, on the subject of the service of a law student, were referred to the Legal Education Committee.

Mr. Ferguson gave notice for Saturday, 11th February, of a motion to amend the rules in special cases, so far as they refer to the call to the bar of Ontario of English barristers.

Tuesday, February 7th, 1882.

Present—The Treasurer and Messrs. Wallbridge, McCarthy, Bethune, Irving, Read, Martin, Murray, Crickmore, Mackelcan, J. F Smith, Maclennan, Robertson, Moss, Benson, L. W. Smith, H. Cameron.

The rules as to reporting, which were read first time on the 27th December last, were now read a second time.

Mr. Maclennan laid on the table the resignation of Mr. Tupper as reporter, and gave notice for Saturday, 11th inst., of a motion that Mr. Grant, reporter in the Chancery Division, be transferred to the reportership of the Court of Appeal.

Ordered that notice be given to each bencher, of the intention to appoint a reporter, either to the Chancery Division or the Court of Appeal, on Friday, 17th February, and that an advertisement asking for applications for the office be published.

Saturday, February 11th, 1882.

Convocation met.

Present — Messrs. Crickmore, McMichael, Hoskin, Bethune, Maclennan, Irving, Ferguson, Moss, Foy, Murray.

In the absence of the Treasurer, Mr. Irving occupied the chair. Mr. Tupper's resignation of the reportership of the Court of Appeal was accepted.

Mr. Grant, the reporter of the Court of Chancery, was transferred to the now vacant office of reporter to the Court of Appeal. The rules as to reporting were read a third time and passed.

The report of the Finance Committee, accompanied by the balance sheet for 1881, and the estimates for 1882, were now considered and adopted.

Ordered that the balance sheet be printed and distributed.

Mr. Ferguson pursuant to notice, moved the following resolution, namely :—

Resolved that rules 94 and 97, relating to the call of barristers in special cases, and the admission of attorneys and solicitors in special cases be amended, by striking out in the first sub-section of rule number 94, all words after the word "Ontario" in the third line down to and inclusive of the word "Scotland" in the seventh line of the said sub-section, and by striking out the second sub-section of said rule 94, and by striking out all words after the word "Ontario," in the second line of sub-section one of rule 97, down to and inclusive of the word "Scotland" in the fourth line of the said sub-section, and by striking out the portion of sub-section two of rule 97, from the beginning of the said sub-section two, down to and inclusive of the word "Scotland" in the sixth line of the said lastly mentioned sub-section, and that such amendments take effect, and come into force on the first day of Michaelmas term next.

Resolved, that it is expedient that the said admendment should be adopted, and that a Committee be appointed to consider the powers of convocation, and report upon the best means of carrying out the changes which would become necessary upon the adoption by convocation of the rules contemplated by the said motion, and that the Committee be composed of Messrs. Crickmore, Moss, Bethune, Maclennan, and Ferguson.

February 17th.

Present—Messrs. Read, Crickmore, Cameron, Mackelcan, Bethune, Moss, Hoskin, Benson, L. W. Smith, Irving, Maclennan, Britton, Pardee, Hardy, Crooks, Fraser, McCarthy, J. F. Smith, Murray, S. H. Blake.

In the absence of the Treasurer Mr. Read was appointed chairman.

The petition of Thomas Arthur Elliott was granted.

Mr. Hoskin presented a petition relating to the opening of the library at night.

Ordered that it be considered forthwith.

Resolved, that the order adopted in November, 1881, as to the opening of the library at night be continued until 1st July, 1882.

A communication from the Secretary of the Telegraph Co., in reference to the Osgoode Hall office, and a letter from the operator on the same subject, were referred to the Finance Committee with power to act.

Mr. Thomas Percival Galt was appointed reporter of the High Court of Justice Chancery Division.

On the motion of Mr. Mackelcan, seconded by Mr. Moss, it was ordered that Messrs. Maclennan, S. H. Blake, Bethune, and the mover and seconder be a Committee to wait upon the Ontario government, with the view of securing a reduction in the fees charged for short hand notes at the trial and hearing of causes.

The letters of the President of the Osgoode Legal and Literary Society, referring to accommodation for their debates, were read. On the motion of Mr. Moss it was

Ordered that the Legal and Literary Society be granted the use of the great hall for its next public meeting, and that the other matters referred to in the communication of the President of the Society, be referred to the Finance Committee to report to Convocation upon the probable expense.

On the motion of Mr. Murray, seconded by Mr. Mackelcan, it was ordered that the telegraph and telephone operator be allowed forty dollars per month for herself, and four dollars for a messenger boy, from the 1st of February instant until the 1st of July next, and that for the purpose of providing a fund to meet such amounts, the operator be ordered to collect a sum of two cents on every telephone message sent out or received in the office, and that twenty-five per cent on the total of the telegraph business done in this office be collected and applied to the above fund, to meet the payment of the said sums of forty and four dollars a month, and that she do keep a strict account and report state of fund monthly to the Finance Committee at their regular meeting.

Convocation adjourned.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

COUNTY COURT, MIDDLESEX.

BROWN v. MCKENZIE, SOMMERVILLE, Garnishee.

Practice in County Court—Rules 404, 422, 425, Ont. Jud. Act.

This was an application by the garnishee upon notice of motion to set aside an attaching order.

A preliminary objection was taken by the judgment creditor, that the application should have been by summons and not by notice.

Reference was made to Rules 404, 422, 425, and 490, Ont. Jud. Act.

DAVIS, CO. J.—By the above Rules, County Court Judges, in addition to the duties properly belonging to their own Courts, are required to discharge the special duties in relation to matters in the High Court under Rule 422. When exercising such delegated authority it is clear from the language of Rule 425 that all applications (not expressed to be *ex parte*) in High Court proceedings must be by summons. In County Court proceedings it is quite different; there the Judge exercises a power, not delegated but inherent. And therefore, in conformity with the practice of the High Court—made applicable by Rule 490 to the several County Courts—the application must be by notice and not by summone. The objection taken cannot be sustained.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

LAWRIE v. LEES.

Power of Court to vary its orders—Judicature Act.

[Nov. 29; H. L.—L. R. 7 App. 34.

LORD PENZANCE:—"I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up

mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court. * * * Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands, without prejudice to any such application to the Court below."

TOKE v. ANDREWS.

Imp. Jud. Act, 1873, s. 24, sub-s 3, 7; O. 19, r. 3, 19; O. 20, r. 1.—Ont. Jud. Act, s. 16, sub-s. 4, 8.—Rule Nos. 127, 149, 152.

Pleading—Counter-claim and set-off in reply.

Defendant having set-up in his defence by way of counter-claim matter arising since the commencement of the action, plaintiff may in his reply set up by way of counter-claim other matter arising since the commencement of the action, (but at the same time and out of the same transaction as the counter-claim of the defendant), although said matter arose before the delivery of the statement of defence.

[Feb. 23—L. R. 8 Q. B. D. 428.

The plaintiff in the above action issued a writ on August 26th to recover rent in arrear at midsummer, 1881, in respect of a tenancy about to determine on September 29th following. He did not, however, deliver any statement of claim until November 29th. Meanwhile the last quarter's rent became due, and the tenancy being determined, pursuant to notice to quit, the defendant became entitled to an out-going valuation, which he claimed by a counter-claim in his statement of defence. In answer to this counter-claim the plaintif, "by way of set-off and counter claim," claimed for his last quarter's rent and also a sum for title rentcharge left unpaid by the defendant on his quitting and necessarily paid by the plaintiff.

This was a motion to rescind an order of Williams, J., dismissing an application to strike out these matters alleged by the plaintiff in his reply, as embarrassing to the fair trial of the action within Imp. O. 27, r. 1, (Ont. Rule No. 178).

G. Denman, for the defendant.

R. V. Williams, for the plaintiff.

FIELD, J., delivered the judgment of the Court, which is lengthy, but divides itself conveniently into three parts.

The plaintiff did not take any objection to the defendant's pleadings, and therefore the Court observed that the only question for it to decide was whether the plaintiff was to be defeated in his action by matter of defence arising subsequently to the commencement of it, without the opportunity of setting up any defence he might have. As to this the Court said :—

(i.) As was clearly pointed out by Mr. Denman in his argument for the defendant, a counter-claim by a plaintiff in answer to a defendant's counter-claim is not mentioned or referred to in terms either in the Jud. Act or in O. 20. r. 1, (Ont. Rule 152), or any other order framed under them. * * * But if tnere be no rule or order either in terms or by necessary implication prohibiting the bringing forward of the matter alleged by way of counter-claim, and the right to raise it is given to the party pleading by the Jud. Act, it will be impossible for us to hold that the plaintiff is not entitled on setting up such matter to claim relief within s. 24, sub-s. 3, (Ont. s. 16, sub-s. 4); and if relief can be given upon it the pleading cannot be held to be embarrassing within the meaning of O. 27, r. 1, (Ont. Rule 178). In order to see how this is we must look to the Jud. Acts. * * * Looking at this most beneficial provision (Imp. s. 24, sub-s. 3 and 7, Ont. s. 16, sub-s. 4 and 8), how is it possible to say that a matter upon which, if well founded, the plaintiff is clearly entitled to relief as against the defendant's counter-claim, is not within the very words and still more within the spirit of this large enactment, or to hold that such a matter is not properly brought forward at the only stage and in the only manner in which it can be raised.

(ii.) Further it is not, perhaps, altogether clear that the right to plead as the plaintiff has done is not within a fair construction of O. 19. r. 3 (Ont. Rule 127) by which alone the defendant has acquired the right he has exercised.

(iii.) There is another way of looking at it, pointed out by Mr. Vaughan Williams. The efendant's co unter-claim in the present case, over-topping as it does the amount of the plaintiff's claim, is in substance a cross-action in which the defendant is the plaintiff, and there is no great violence in construction in holding that

the plaintiff for the purpose of litigating the counter-claim is in substance a defendant, and so well within rule 3 (Ont. Rule 127) justifying a counter-claim.

Order affirmed.

[NOTE.—*The Imp. and Ont. sections are identical respectively. Imp. O. 19 r. 3 and 19 are identical with Ont. Rules 127, 149 respectively; Imp. O. 20, r. 1 is not identical with Ont. Rule 152.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [May 3.

THE CONSOLIDATED BANK V. WALLBRIDGE.

Motion for Judgment—Rule 318.

Motion for judgment upon the report of the Master in this cause.

The point in question in this action was whether an alleged partition in the pleadings mentioned was binding upon the parties thereto. On October 17th ult., BOYD, C., made a decree referring it to the Master to enquire as to this. On March 15th ult.. the Master reported that the alleged partition was conclusive and binding upon the parties.

Held, rule 318 met the case, and judgment must be according to the report and be so entered.

Dickson, Q.C., for the motion.

Watson, contra.

Boyd, C.] [May 10.

VANKOUGHNET V. DENISON.

Restrictive covenant—Evidence.

In this case the defendant Denison, in effecting a sale of a portion of his real estate covenanted with the purchaser that he would retain a certain square unbuilt upon, with the exception of one residence, with the necessary out-buildings, including a porter's lodge; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law, to be carried on upon the portion conveyed to him. The bill was filed by an assignee of the purchaser alleging that the defendant Denison, and the defendant E. W., who resided with him, were, in violation of the covenant, erecting a house upon such square not within the exception in the covenant.

Held, the benefit of the restriction passed to plaintiff as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and although the benefit of it was not formally transferred to him.

Semble, evidence of reputation was admissible to show what was meant by "Bellevue Square" in the restrictive covenant, for the question of the locality and extent of this square was of a *quasi* public nature, in which a class of people in the neighbourhood would be concerned.

Where it is clearly intended to give some tangible benefit to the grantee by a restrictive covenant in the conveyance to him, and the restriction is part of the consideration which induced his purchase, there the Court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement.

It would be unsafe to proceed judicially upon the evidence, however clear and satisfactory, of any one who, having executed an instrument, seeks to lessen its force or effect by his own unsupported parol testimony.

A person holding under an agreement for a lease is not in the same position as an innocent person holding for value under a completed instrument.

Maclennan, Q.C., for the plaintiff.

Blake, Q.C., (with him *Black*), for the defendant.

[This case was previously heard on demurrer as reported 28 Gr. 485.]

Boyd, C.] [May 10.

REID V. SMITH.

Specific performance—Partnership property—Parol evidence.

In this case the plaintiff sought specific performance of an agreement for the sale of timber limits to him under the following circumstances. The timber limits were really partnership property, though they stood in the name only of the

partner who signed the agreement referred to. Both partners were anxious to sell, but the agreement in question, which referred only to a portion of the timber limits owned by the partnership, was entered into by the one partner only. It was, however, forthwith communicated to his co-partner who did not object to it or dissent from it, but, indeed, shortly afterwards furnished nformation to the purchaser which he was only entitled to ask for in pursuance of the agreement to sell.

Held, so far as authority to contract was concerned, the agreement to sell was, under the above circumstances, binding upon the partnership, though as a matter of precaution the joining in the conveyance by both the partners was desirable.

Semble, the language of Lord Mansfield in *Fox* v. *Hanbury*, Cowp. 445 "each partner has a power singly to dispose of the whole of the partnership effects," is too broadly put in view of the present state of the law.

Held, also, though the written agreement sued on imported a down payment of the purchase money, yet extrinsic evidence was admissible to show that this was not the real agreement, and to prove that terms of credit were to be given as set forth in memoranda put in evidence signed by the firm name.

Held, also, it was competent for the managing partner and the purchaser to subsequently put an end to the terms of credit, and agree to a cash payment, thus reverting to the terms of payment contained in the contract set forth in the statement of claim.

W. Cassels, (with him *Brough*) for the plaintiff.

Bethune, Q.C., for defendant Macdougall.

Moss, Q.C., for defendant R. C. Smith.

W. Cassells, *Brough*, and *Plumb*, for defendants T. & P. C. Smith.

Boyd, C.] [May 10.

SANDERS V. MALSBURG.

Conveyance from wife to husband—R. S. O. c. 109, sect. 2.

Where by anti-nuptial settlement the intended husband and wife mutually agree that each of them shall separately hold, use, and enjoy the real and personal property which either may acquire during the marriage, whether by donation, succession, legacy, bequest, or by any title or way whatever, as his or her own separate and respective property and estate in every respect, and each is to have the whole and sole absolute management, disposal and administration of his and her separate and respective property and estate, without the let or hindrance of the other, the effect is to vest the land then and subsequently held or acquired by the wife in her as proper separate estate to all intents and purposes.

Where then the wife in such case gives a mortgage of property so held by her, she retains power to deal with the equity of redemption and and to alienate it as a *feme sole*. This power she has as of right by virtue of the equitable quality of the estate without the aid of the statutes relating to married women, and without the concurrence or joinder of her husband, and therefore there is no incongruity in the husband being the grantee of the wife ; on which ground *Ogden* v. *McArthur*, 36 U. C. R. 246, is distinguishable.

Though the technical learning as to the legal unity of husband and wife, may require at law the intervention of trustees in their dealings *inter se*, yet the course of the Court of Equity is to give effect to such transaction by holding the one a trustee for the other : and there is no reason why the rule applied to the husband, should not apply conversely to the wife when dealing with her separate estate, so as to convert her into a trustee for her husband.

Where an agreement in writing has been executed, in the province of Quebec, it must be assumed in the absence of any evidence to the contrary, that its legal effect is such as would be given to it if entered into in this province.

Semble, that R. S. O. c. 109, sect. 2, is retrospective so as to cast the *onus* of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment.

G. Morphy, for plaintiff.

T. S. Plumb, for defendant.

Boyd, C.] [May 10.

COURT V. WALSH.

Statute of Limitations—Mortgage—Insolvency.

Where the right of action for entry or foreclosure is ken away. by virtue of the R. S. O., c.

108, sect. 15, the title itself of the mortgagees is extinguished, and the right of action wholly disappears. Hence the result is not merely a bar of the claim, but a divesting of the title or a transfer of the whole right, title, estate and interest of the mortgagee to the mortgagor, or those claiming under him. *Dawkins* v. *Lord Penryhn*, L.R., 6 Ch., D. 318; L.R., 4 App. 51; *Heath*, v. *Pugh*, L.R., 6 Q.B.D. 345, followed.

Where, moreover, a mortgagee has suffered the title to run before he asserts his right of entry he cannot by getting possession of the property revive his title to it, but he is in as a mere trespasser. *Bryan* v. *Cowdal*, 21 W.R. 693; and *Sanders* v. *Sanders*, L.R. 19 Ch, D. 373, followed.

Nor does the insolvency of the mortgagor and the appointment of an assignee in insolvency suspend the running of the Statute of Limitations, so as to preserve the lien and security of the mortgagee on the land mortgaged, and enable him to claim the benefit of sect. 84 of the Insolvent Act, and insist on valuing his security as if the mortgage still subsisted on the land. *Henderson* v. *Kerr*, 22 Gr., 91 followed.

Maclennan, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

Boyd, C.] [May 10.

BRIGHT V. MCMURRAY.

Conveyance—Mortgage—Statute of limitations.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees "their heirs and assigns forever all and singular" the mortgaged lands, "to have and to hold the same as and for all the estate and interest" of the grantors "in and to the same."

Held, a sufficiently definite description to pass the fee to the grantees, inasmuch as the technical word "assign" was coupled with the proper words of limitation to heirs and assigns, and with the habendum to hold the land for all the "estate' of the mortgagees in possession. Hence the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees and coupled with their own subsequent possession for the necessary period conferred on them an absolute title to the land by virtue of R. S. O. c. 108, sects. 15 and 19.

Moss, Q.C., (with him *J. E. Robertson*) for the plaintiff.

H. J. Ferguson, for the defendant.

Boyd, C. [May 10.

MUNSIE V. LINDSAY,

Will—Doctrine of election.

Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of 26 Geo. II., c. 6, sect 1, and, therefore, the doctrine of election does not apply, for since the beginning of this century it has been treated as settled law, that the doctrine of election is not applicable where real property is assumed to be devised by a will not executed so as to pass it, and by the same will a legacy is given to the heir.

W. Cassels, for plaintiff.

Bethune, Q.C., (with him *W. Barwick*), for defendant Lindsay.

C. A. Brough, for other defendants.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Rights and liabilities arising through the promotion and formation of a corporation.—*American Law Review*, April, May.

Constructive total loss.—*Ib.*, May.

The rights of *bona fide* purchasers of under-due negotiable paper secured by mortgage.—*Southern Law Review*, Aprll.

Chance verdicts.—*Central L. J.*

Re-issued patents.—*American Law Review*, April.

Unification of the law.—*Ib.*

Legality of cremation.—*London L. J.*, March 18.

Clubs and the outside world.—*Ib.*

Liability of solicitors for partners.—*Ib.*, April 8.

Charging the jury.—*Virginia L. J.*

Justices interested—Undue influence.—*Irish L. T.*, March 25. (From *Justice of the Peace.*)

Severability of insurance.—*Albany L. J.*, March 25.

FLOTSAM AND JETSAM.

STRANGE APPLICATION OF A STATUTE.—A quack doctor in Chicago, who was recently sued for malpractice in the treatment of a female patient, called to his assistance a limb of the law, who bore a similar relation to that profession that the doctor did to his. He astonished his opponent, the Court, and attorneys, by pleading the Statute of Frauds, by which, without a writen contract, "no person shall be held to answer for the debt, default or miscarriage of another."—*American Law Magazine.*

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar:

Edwin Taylour, English Honors and Gold Medal; Adam Johnston, Honor and Silver Medal; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases:—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law:—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B.I., vv. 1-300; or Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1882—The Deserted Village.
The Task, B. III.

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Conntry Churchyard.
The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencemen. of the Second Punic War to the Death of Augustust

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DIARY FOR JUNE.

1. Thurs. Parliament first met at Toronto, 1797.
2. Fri.... Fenian Attack, 1866.
3. Sat.. Easter Sittings end.
4. Sun... *Trinity Sunday.*
6. Tue .. Toronto Assizes.
8. Thurs. First Meeting of Parliament at Ottawa, 1866.
11. Sun... *1st Sunday after Trinity.*
12. Mon.. County Court Term for York begins.
13. Tue .. County Court sitt. (except York) begin.
20. Tue .. Toronto Oyer and Terminer.

TORONTO, JUNE 1, 1882.

THE Hon. Mr. Justice Galt will take the summer assizes at the City of Toronto, the civil business commencing on June 6th, and the criminal on June 20th.

THE death is announced of Sir John Holker, one of the Lords Justices of the High Court of Appeal in England. He is to be succeeded in this position by Sir Charles Bowen, at present Judge of the Court of Queen's Bench.

ON Friday, the 26th ult., the Benchers appointed Mr. Lefroy to be Reporter of the Chancery Division of the Supreme Court, *vice* Mr. T. P. Galt, resigned. The appointment of one of our editorial staff to the position of official reporter will, we trust, be of advantage to our subscribers.

BY notice, published on the 17th ult., the hearing of all cases in the Court of Appeal set down for the 25th ult. has been postponed by order of the Court until the sittings commencing on the first Tuesday in September next, and the hearings in causes and matters which would have been in time, according to the practice of the Court, if they had been brought to a hearing at the sittings which were to have been held on the 25th ult. are to be held to be in time if brought to a hearing during the September sittings.

IT seems rather an extreme instance of judicial severity which was visited upon one Patrick Gordon the other day in England. The unhappy man conceived a desire to travel from Holyhead to Chester without paying his fare. He accordingly got under an express train, grasped the brake-rod with his hands and legs, and rode in this most perilous position for ninety miles without stopping. The feat seems almost inconceivable, and it is not surprising to read that by the time the train reached Chester the man was more dead than alive. He was, however, not only locked up, but sentenced to twenty-one days hard labour, *pour encourager les autres.* No doubt if this method of riding without a ticket became generally adopted it would be necessary to put it down, but we cannot help thinking that in this instance, so little likely to repeat itself, justice might have been tempered with a little more mercy.

THE latest and most handsome gift of the Incorporated Council of Law Reporting for England and Wales is now in the hands of subscribers to the Law Reports, and consists of a Digest of the whole of the Law Reports from their commencement in the year 1866, down to the end of 1880, with a Digest of the important statutes relating to England and Wales during the same period. The excellent plan has been adopted of prefixing the work with a table of names of cases, giving the defendant's names in alphabetical order as well as the plaintiffs; and also with

tables of statutes, which enables the reader to find at a glance whether any section has been judicially construed or expounded; while the cases followed, over-ruled or specially considered are also to be found collected together. The cost and trouble expended in the compilation of this work must have been immense, and with extreme liberality copies are being delivered in this country free of all expense. There can be no question that to subscribe to the Law Reports is the best method of compiling a law library of permanent value, and this last bonus will win many new subscribers. Meanwhile, non-subscribers can obtain the Digest, "so long as there are copies to spare," for £2 2s.

THE motion which Mr. Mercier succeeded in passing, by what appears to have been somewhat of a surprise, in the Legislative Assembly of the Province of Quebec, on the 27th ult, is of rather an extraordinary nature. It is to the effect that for the reasons therein set out, an humble address be presented to Her Majesty, praying that a measure be submitted to the Imperial Parliament for the amendment of the British North America Act, so as "to give to the popular branch of the Legislature the power to amend the local constitution without concurrence of the other branch, whenever, upon a message from the Lieut.-Gov., presented upon the advice of the Executive Council, such changes may become necessary for the improvement of our finances and to prevent the imposition of new taxes." The reason given for this proposed legislative *coup d'etat* is, that it is necessary "to simplify the too complicated machinery of our local constitution" for the sake of economy. The B. N. A. Act already provides, sect. 92, that in each Province the Legislature may from time to time amend the local constitution; and those who have read the graphic account of the negotiations which passed between the Imperial Government and the Local Government in connection with the "dead-lock in Victoria," given in Todd's Parliamentary Government in the British Colonies, will see that the Imperial Government is little likely to consider it proper to do, for such paltry reasons, in Quebec, what they considered it their duty to refuse to do for far weightier reasons in Victoria.

IT is curious how often the tedium of researches into law is relieved by unexpectedly coming across some strange glimpses into the more grotesque side of human nature,—as in the case of Mr. Dagg's matrimonial contract, to which we recently called attention,—or some brilliant and witty metaphor, (see 16 C. L.J. 155), or quaint judicial utterance. An example of the latter is afforded by a passage in the judgment of Jessel, M.R., in the recent case of *Couldery* v. *Bartram*, L.J. 19 Ch. D. 399, where it says:—"According to English common law, a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English common law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary, together with his 19s. 6d., there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English common law. . . . Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. . . Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary-birds, or tomtits, or rubbish of that kind to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agree-

ment constituting an addition to the dividend so as to make the agreement no longer *nudum pactum*, but an agreement for valuable consideration; then there would be satisfaction."

RECENT ENGLISH DECISIONS.

Proceeding with the Law Reports for April there still remain for review the cases in 19 Ch. D., pp. 311–519; 8 Q. B. D., pp. 317–444; 7 P. D., pp. 5–20.

PARTIES—PAYMENT INTO COURT—COSTS.

In the first of these, at p. 326, is the case of *Heatley* v. *Newton*. Here the plaintiff, who had purchased certain property at an auction, brought an action against the vendors and auctioneers to have the contract rescinded, the deposit, £1,300, repaid with interest, the costs of the action, and for damages. He alleged that no real bidding took place at the auction; that a number of pretended bids were taken by the auctioneer from time to time; that the whole was a fraudulent arrangement to run up the price; and that the auctioneer, as well as the vendors, must be treated as parties to the fraud; and that at all events a fraud was committed by the auctioneer in pretending to receive bids which he never in fact received at all. The auctioneers applied for liberty to pay the deposit into Court, and to have the action dismissed against them on such payment being made. The M. R. did not make the order exactly as asked, but he made an order that upon the money coming into Court, and upon the auctioneers undertaking to pay the interest on the deposit up to the time of payment into Court, and the costs *up to that time*, in the event of the Court holding the plaintiffs' to be entitled to such interest and costs, and of the other defendants' failing to pay them, the proceedings should be stayed as against the auctioneers. The Court of Appeal now held that this was not a proper order, for the reasons thus stated by Lindley, L.J., at p. 341:—"Any defendant, I apprehend, can stay proceedings in an action upon giving the plaintiff all he asks for as against him, and if the auctioneers had said to the plaintiff, 'Here is £1,300 interest and costs up to this time—let us go,' I could understand it; but that is not what they have done, nor what they intended to do. What they have done is this: they have paid the £1,300 into the Court in the hope that it would stop interest, (as to which I say nothing now, although my impression is rather against them,) and they say:—'We will not pay that to you, but we leave you to discuss with the vendors as to who is to have it; if you are right you will get it, and if you are wrong the vendors will get it; we have got rid of it and all liability as to the costs of the action subsequently to this time.' I am of opinion that they cannot take this course. They must abide the consequence of that which is alleged to be their wrongful act. If they are wrong they are liable to a judgment of £1,300 with interest and costs, and that liability cannot be got rid of by any such process as this. And therefore," he said, "the auctioneer's summons ought to have been dismissed with costs."

DISCOVERY—PARTIES.

An interesting subordinate point is discussed in this case. Counsel for the plaintiff argued that he was entitled to keep the auctioneers before the Court, apart from any question of personal pecuniary responsibility, upon the ground alone of being able to obtain discovery from them which would enable them to establish their case as against the other defendants. As to this Lush, L.J., says:—"I quite agree that you cannot claim to retain parties as defendants in a suit merely because you want to interrogate them; but it appears to me that where they are properly made defendants it is a ground for not letting them off summarily, that there is a very great advantage accruing to the plaintiffs from being at liberty to interrogate them instead of simply calling them as witnesses at the trial.

We all know that a person who calls a witness at the trial is not allowed to deal with him as if he were being cross-examined, unless the judge gives leave, upon the ground that he appears to be a hostile witness, which is a very different thing from extracting the information before the trial, and being able to read the admissions so made. No doubt answers to interrogatories by one of several defendants cannot be read as evidence against the others, but in order to make them evidence he must be called as a witness. On the other hand, we all know what great influence the admission of a co-defendant, especially one standing in the relation in which an agent does to the principal, has upon the conduct of the principal, and I cannot conceive that when these vendors, who say by their answer to interrogatories that they have no knowledge at all on the subject of whether there were mock biddings or not, find out, if they do so find out, by the sworn answer of the auctioneers, that they were mock biddings, that will not have very great influence on them as to whether they will further defend the suit or not. The auctioneers having been properly joined as defendants, it appears to me that the plaintiffs have a right to say:—'We will not forego a single advantage to which the presence of these parties as defendants entitle us.'" And Baggallay, L.J., appears not to dissent from these views on this point.

The case of *Walker* v. *Mottram*, p. 355, has already been noticed as reported in the *Law Journal* reports, supra p. 174, and the next case requiring notice appears to be *Sanders* v. *Sanders*, p. 373.

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT—TENANTS IN COMMON.

In this case, which came on on admissions, the Court of appeal decided, (i.) that where a tenant in common has gained by the Statute an adverse title to another share of the property, no payment of rent or acknowledgment by him can restore the title which has been extinguished by the statute. Malins, V.C., had held that when the statute of limitations has run in favour of one and against another, and the former chooses afterwards to acknowledge the right of the latter, that acknowledgment, given after the expiration of the twenty years, restores the right of the latter. For he held the meaning of Imp. 3, 4 Will. IV. c. 27, sect. 28, (R.S.O., c. 108, sect. 15), to be that the right or title shall be extinguished in favour of those who desire it to be so, but not as to others. The Court of Appeal, however, over-ruled this, and followed *In re Alison*, L.R. 11 Ch. D. 284, as an express decision that when a statutory title has accrued, by the expiration of the time named in the statute, it cannot be defeated by a subsequent acknowledgment. (ii.) But the Court held that, as it was admitted that the tenant-in-common, claiming title under the statute, had paid a moiety of the rents to persons claiming under his co-tenant from 1864 to 1877, this raised a presumption that a similiar payment was made previously, and that as the admissions did not negative this inference, the defence on the Statute of Limitations could not be supported. Jessel, M.R., says as to this: "The payment of a moiety of the rents for thirteen years is good evidence that a moiety was paid previously."

FRESH EVIDENCE ON APPEAL.

(iii.) The appellant having applied for leave to adduce fresh evidence, the Court of Appeal refused leave, Jessel, M.R., saying: "The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point in which evidence is wanted having been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury. Moreover,

speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds, than in favour of an attempt to defeat a good case on technical grounds."

PATENT—SLANDER OF TITLE—DAMAGES.

The decision of the Court of Appeal in *Halsey* v. *Brotherhood*, p. 386, which was based upon the authority of *Wren* v. *Weild*, L.R. 4 Q.B. 730, and which confirmed the decision of the M.R., in the Court below, appears clearly from the following extract from the judgment of Lord Coleridge, L.C.J. —"Here is a defendant in possession of a patent, who says, and, for all that appears, says with perfect *bona fides*, to the plaintiff and to persons who are going to deal with the plaintiff, 'Remember that what the plaintiff is making is an infringement of my patent and is an injury to my property, and I will tell you that if you proceed to injure my property I shall take proceedings against you.' The result of this may be injury to the plaintiff. Possibly in this case it has been injury to the plaintiff. I am quite content to assume that it has, but it appears to me that a statement made under such circumstances does not give a ground of action merely because it is untrue and injurious: there must be also the element of *mala fides* and a distinct intention to injure the plaintiff, apart from the honest defence of the defendant's own property" Or, as the point is put in a more general and more abstract form by Baggallay. L.J.—"It appears to me that an action for slander of title will not lie, unless the statements made by the defendant were not only untrue, but were made without what is ordinarily expressed as reasonable and probable cause, and this rule applies not only to actions for slander of title, strictly and properly so-called with reference to real estate, but also to cases relating to personalty or personal rights and privileges."

DUTY OF DRAWER TO STOP CHEQUE—BANKING.

The two points of law which are illustrated by *ex parte Richdale*, p. 409, may be concisely put as follows: (i.) there is no obligation, arising by contract or by law, on the part of the drawer of a cheque, given for value, to stop the payment of it for the benefit of a third party. The person who gave the notice to stop it would run the risk of the cheque being in the hands of a *bona fide* holder for value, that is to say, he would run the risk of having to pay the costs of an action by such a holder. (ii.) Where a customer pays a cheque to his bankers, in order that the amount of it may be at once placed to his credit, and the bankers carry it to his credit accordingly, they become immediately holders of the cheque for value.

COURT OF APPEAL—EVIDENCE.

In *ex parte Firth*, p. 419, it appears only necessary to notice certain dicta of Jessel, M.R., to the effect that the Court of Appeal cannot decide an appeal in the absence of the evidence on which the order appealed from was founded, although, if by some accident the notes of the evidence were lost, the appellant might apply by way of indulgence to the Court of Appeal to have the evidence taken over again, and the Court might or might not accede to that application.

WILLS—BEQUEST OF SHARE IN PARTNERSHIP—R.S.O. C. 106, SS. 25, 26.

The next case, *In re Russell*, p. 432, was, as Bacon, V.C., observes, "one of difficulty." The testator, after reciting that he was carrying on a certain business in partnership with his two brothers, demised and bequeathed: "all my part, share and interest, of and in the said co-partnership, trade or business, and of and in the real and personal estate which may be used, employed or invested therein, . . . and of and in the co-partnership debts, securities, and moneys to which I may be entitled at my decease," to the executors on certain trusts. After the making of this will, the testator acquired the shares successively

of each of his brothers in the partnership, and continued to carry on the business as sole owner until his death. The principal question was, whether the whole of the property in the business belonging to the testator at his death passed under the will. Bacon, V.C., held that it did, saying:—"When you find the scope of a man's will to be, 'I, being a manufacturer, in partnership, give to my wife the enjoyment of all the share in the business I am carrying on to which I may be entitled at my death,' it cannot be, because that property has become increased by his own purchases or by the death of his brothers, that the provision he has made is to be confined to the one-third of which he was possessed at the date of his will. That would be a very violent construction, and one which I think the Court is not compelled to adopt. . . . In my opinion the 23rd section of the Wills Act, (R. S. O., c. 106, sect. 25), has a direct application, and I hold that the acquisition of a larger interest does not affect in the slightest degree the disposition which the testator made of all the interest he had in the houses, chattels and other property, in the co-partnership business, although the partnership had ceased to exist, and he had become the sole owner of the property."

WILL—NEXT OF KIN "BY VIRTUE OF THE STATUTES" OF DISTRIBUTION.

In *Sturge* v. *G. Western Railway Co.*, p. 444, the testator's will contained an ultimate trust "for the person or persons who at the time such *respective* decease of my children shall, by virtue of the statutes for the distribution of persons dying intestate, be my next of kin, and if more than one, then in the shares, proportions and manner prescribed by the said statute." Hall, V.C., held that by these words the testator had created an artificial class, a class to be ascertained at a time posterior to the testator's death, by supposing that he had then died, *i. e.*, at the later date. "Looking at the whole will," he says, "I cannot divest my mind of the impression that the true construction of it is that the testator intended, and in effect said, at each of several periods you shall ascertain the class, and then the members of it are to take in certain modes, but the modes in which they are to take must be regulated by the Statutes of Distribution as nearly as the existing circumstances of the case will admit—the class being different from that which would have comprised the persons to take if it had been directed by me to be taken at a different period, viz., at my death."

PRACTICE—INFANT—WARD OF COURT.

De Pereda v. *De Mancha*, p. 451, illustrates two points which may be briefly mentioned as follows:—(i) Where in an administration action moneys are paid into Court to the separate account of an infant, this is sufficient to constitute the infant a ward of Court, though the infant be not a party to the said action, and though he may not have been served with notice of the judgment or of any of the proceedings in the action. (ii) Where, upon the hearing of a summons taken out for the appointment of a guardian to an infant, no order has been made, but, upon the suggestion of the Judge, an arrangement has been made as to access to the infant, *semble*, this is of itself sufficient to constitute the infant a ward of Court.

EASEMENT LIGHT R. S. O., C. 108, SECT. 37.

In *Seddon* v. *Bank of Bolton*, p. 462, two points require notice. The first (i) is shown by the following passage from the judgment, (Fry, J.):—"I have to ask myself upon whom does the burden rest of proving the enjoyment of the access of light for twenty years? The answer is plain—it rests on the plaintiff. Has, then, the plaintiff discharged that burden? I answer she has not, because there is no evidence tendered by her on which I can rely. . . . The defendant may, in my judgment, displace the whole effect of the affirmative evidence of the plaintiff in either of two ways. They may either show the existence of an obstruction at the commencement of the twenty years, or an interruption

at some period afterwards, or they may show —and in this case, in my judgment, they have shown—that the evidence of twenty years' enjoyment tendered by the plaintiff is evidence on which the Court cannot rely, because the plaintiff's witnesses are contradicted by other witnesses on whom the Court does place reliance." (ii) In this action, which was brought to restrain an alleged interference by the defendants with the plaintiff's ancient lights, the defendants adduced evidence to show that during parts of the period requisite to perfect the plaintiff's right a boarding had been erected by the then owner of the defendant's land which had interrupted and obstructed the lights in question. Fry, J., expressed an opinion, though not necessary to the decision of the case, that this did not alone amount to that kind of notice to the person interrupted of the person authorizing the erection of the boarding, which would make the boarding an interruption within sect. 4 of the Imp. Prescription Act, (R. S. O., c. 108, sect. 37). It may be observed that by Ont. 43 Vict., c. 14, sect. 1: "No person shall hereafter acquire a right by prescription to the access and use of light to or for any dwelling-house, work-shop, or other building;" and R. S. O., c. 108, sect. 36, which answers to the section of the Imp. Act under which the above action was brought, is thereby repealed. But R. S. O., c. 108, sect. 37, remains unaffected in its application to the other sections of the Act respecting prescription in cases of easements.

WILL—ABSOLUTE INTEREST—GIFT OVER ON DEATH.

In *in re Hayward*, p. 470, a testator bequeathed his residuary personalty to trustees in trust for the children of L., to be divided equally between them, and directed that:—"In case of the decease of either of them leaving a family, then such share as the parents would have taken shall be equally divided amongst the children of such deceased persons." Fry, J., held that these words pointed to a gift to take effect in the event of the parents dying before the time of taking, *i. e.*, before the death of the testator, the words of the gift over in this case being so clear; and therefore the case did not come within the principle, of which there was, he said in his judgment, no doubt, "that when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency,) the effect of the gift over is *prima facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over."

RAILWAY—GUARANTEE OF VOID DEBT.

Of *Yorkshire Ry. Waggon Co.* v. *Maclure*, p. 478, it seems only necessary to say that though a certain loan to a railway company was held to be a void and illegal transaction as being contrary to certain Imperial Acts, yet certain of the directors having guaranteed the payment of the money loaned, the guarantee was held to be none the less valid, and the sureties liable under it. Kay, J., observes: "Probably the very reason in this case for requiring the guarantee was the doubt that existed whether the company could be compelled to repay the money. I asked for authority upon this point, but none was cited. I therefore must decide that the directors are liable upon their guarantees."

POWER—APPOINTMENT OF PORTIONS BEFORE REQUIRED.

Henty v. *Wrey*, p. 492, was a case on a point on which there appear to be very few decisions of recent dates. B. W., under a certain settlement, had a power of appointing portions charged upon real estate for younger children in proportion to the number of such children, "such sums to be an interest vested in and to be paid to the child or children for whom the same were intended to be thereby provided on or at such age, day, or time . . and to be divided between them . . in such shares, and to be attended

with such provisions for their respective advancement and education as the person making such charge should think fit." B. W. having only three daughters, *aged nine, and seven years, and one year*, appointed £10,000, being the full amount he was entitled to charge, for the portions of his three daughters, *to be a vested interest in such children respectively, immediately*, but to be paid at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike, at the age of 21 years or marriage if after his death, or, if the same should happen during his life, then at his death, with maintenance at the rate of £4 per cent. from his death. Kay, J., after observing that "it seems to be settled by authority that in the case of a portion charged on land, if no time is limited for the vesting or payment, and the child for whom it is intended should die under 21 and unmarried, the portion would not be raisable, but would sink for the benefit of the estate;" and after quoting the words of Kindersley, V.C., in *re Marsden's Trusts*, 4 Drew. 594, in which he says, amongst other things, that a power of appointing portions is "only one form of a discretionary trust to be exercised for the benefit of certain objects, or some of them. The objects of the power are the children of the marriage; and the purpose of the settlement was to make a provision for their benefit, but at the same time to reserve to the mother such a power as would keep the children under her control, and to enable her to distribute the property among them in such manner as, in her opinion, their respective wants and interests and the exigencies of the case might require;"—held, the above exercise of the power of appointment by B. W. was invalid. He says, p. 505:—"The principle seems to be, that a power of this kind being in the nature of a discretionary trust, the appointor must be taken to know that it is contrary to the nature of the trust to make an appointment so as to vest immediately portions in children of tender years, and such an appointment would therefore be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. If it were necessary to go further, I must say I think the facts are sufficient to raise what Kindersley, V.C., in the passage I have read, calls a 'judicial inference,' that the intention of the appointor, in making the portions vest immediately was to secure a possible benefit to himself. He had three daughters and no son. A year after the birth of the last daughter he makes this charge, to vest immediately upon an estate which, if no son should be born to him, would go to other persons. I cannot see any reason why these portions should be directed to vest immediately except to benefit himself. The portions would not be raisable till his death. He gave maintenance only from that time, and directed that they should be payable at twenty-one or marriage. He did not provide for any advancement meanwhile."

WILL—SOLICITOR TO TRUST ESTATE NAMED BY TESTATOR.

In the last case in this number, *Foster* v. *Elsley*, p. 518, the point decided appears clearly from the following extract from the judgment of Chitty, J.:—"The testator in this case has inserted a clause in his will that 'my solicitor, W. E. Foster, shall be the solicitor to my estate, and to my said trustees in the managing and carrying out the provisions of this my will.' . . . I am told that no case is to be found in the books like the one before me, where a testator has appointed a particular person as solicitor to his estate, but in analogy to the cases to which I have referred, I decide that the direction in this will imposes no trust or duty on the trustees to continue the plaintiff as their solicitor, and that being my decision I refuse this motion with costs."

A.H.F.L.

REPORTS

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

BARBER V. BLAIBERG.

Imp. Jud. Act, 1873, sec. 24; O. 16. r. 17—Ont. Jud. Act., sec. 16, subs. 4, Rule No. 107—Counter-claim—"Connected with the original cause or matter."

Where a grantee under a subsequent bill of sale is sued as in detinue by the grantee under a prior bill of sale, to recover goods of the grantor wrongfully seized, a counter-claim by him against the grantor, who has been made a party, for the money due to him under the bill of sale, is not a valid counter-claim under the above section and rule.

Feb. 15—L. R. 19 Ch. D. 473.

Action for detinue brought by the grantee, one Barber, under a prior bill of sale against the grantee, under a subsequent bill of sale, one Blaiberg, who had removed from the premises of the grantor, Bass, certain goods and chattels. Blaiberg put in a statement of defence and a counter-claim, and he made Bass a party, and he asked against Barber and Bass for a declaration that he was entitled to full relief under the bill of sale to him, and in the alternative he asked, as against Bass alone, that Bass might be ordered to pay to Blaiberg the amount still due under his bill of sale, with interest and costs.

It was contended that the counter-claim against Bass was informal and should be dismissed.

FRY, J.—This counter-claim has not been opened on any point except the liability of Bass to pay this amount, said to be due on the bill of sale. . . The question, therefore, is whether the payment asked by Blaiberg from Bass is a matter "relating to or connected with the original cause or matter." The original subject of this cause is Barber's right to have the goods which Blaiberg has seized. The two matters are, in my judgment, totally distinct, and ought to be the subject of distinct litigation. Therefore, I think the objection taken to this part of the counter-claim is valid, and the other portion of the counter-claim having been abandoned, I dismiss the counter-claim with costs.

[NOTE.—*The Imp. and Ont. sections and rules are identical respectively.*]

HOWELL V. METROPOLITAN DISTRICT RAILWAY CO.

Imp. O. 4, 5, rr. 3, 8; Ont. rr. 371, 376—Garnishee order—"Debt due or accruing."

A "debt due or accruing" to a judgment debtor, and therefore capable of being attached by a garnishee order under Rule 371, must be an absolute and not merely a conditional debt.

Nov. 9.—L. R. 19 Ch. D. 508.

Aug., 1878. Defendants served plaintiffs with notice to treat in respect to a house belonging to him, under the Imp. Land Clauses Act.

Nov. 27, 1878. Jury fixed compensation at £3,650, and on same day the sheriff gave judgment for that amount.

Jan. 25, 1879. The defendants delaying the completion of their purchase, the plaintiff brought this action for specific peformance of the executory contract.

May 8, 1879. Plaintiff obtained judgment accordingly, subject to the usual enquiries as to title.

Jan. 7, 1880. The chief clerk certified to a good title, subject, *inter alia*, to certain garnishee orders *nisi*, and that such good title was first shown on Dec. 4th, 1878.

Feb. 9, 1880. An order was made, on further consideration, directing a conveyance and payment by the defendants of their purchase money into court.

June 28, 1880. The plaintiff executed an assignment of the property to the company, who shortly after paid the purchase money into Court.

Of the garnishee orders—

(i) Some had been served after the verdict of the jury, but before good title shewn. (ii) Some had been served after good title shewn, but before writ issued. (iii) Some after writ issued, but before judgment. (iv) Some after judgment, but before the date of the certificate. (v) One after the date of the assignment and the payment of the purchase money into court.

Held, none of these garnishee orders affected the fund in court.

CHITTY, J., considering *seriatim* the various classes of garnishee orders, said :—

As to classes (i) and (ii)—"The sections of the Lands Clauses Act, under which the amount of purchase money and compensation is fixed by a jury and the judgment of the sheriff, do not have the affect of creating an absolute

debt due from the company to the landowner; they are merely part of the machinery provided by the Act for ascertaining the purchase money. . . . The plaintiff was not entitled to the money, either at law or in equity, except in executing or tendering a conveyance to the company."

As to classes (iii) and (iv)—"No distinction can be made between the issues of the writ and the obtaining of the judgment. . . Even upon judgment, a good title having been shown, the purchase money did not become a debt payable to the plaintiff. It appears to me that, though in one sense there may have been an equitable debt due to the vendor, there was not such a debt as could be attached. The purchase money was not a debt actually 'due or accruing' within the meaning of the garnishee orders, for the right to it was conditional upon the execution or tender of a conveyance by the vendor. The provisions of O. 45, r. 8 (Ont. rule 376) as to payment or execution being a valid discharge to the garnishee are inapplicable to a conditional debt."

As to (v.)—"With regard to the garnishee order obtained after that date (the date of the order on further considertaion) it is clear from the authorities that it could not affect the fund that was already in court, even though there had been a conveyance; for the money being in court, was no longer 'in the hands' of the garnishee as required by rule 3." (Ont. rule 371.)

[NOTE—*The Imp and Ont. rules are identical. Chatterton v. Watney, L. R. 17 Ch. D. 259; 17 C. L. J. 322, is another recent decision under these rules.*]

HOLLOWAY V. CHESTON.

Imp. Jud. Act, sec. 50; Ont. Jud. Act, 36—Appeal from Judge's order in Chambers.

Dec. 5.—L. R. 19 Ch. D. 516.

Defendants obtained, upon summons, a certain order from a Judge in Chambers. Plaintiffs thereupon served the defendants with a notice of motion for a certificate from his Lordship that he did not desire to have the summons reheard, so as to enable the plaintiffs to go direct to the Court of Appeal; or, in the alternative, that the order might be discharged.

CHITTY, J., said that he intended to follow the practice which had been adopted by the Master of the Rolls, and always to adjourn summonses into Court for argument or judgment in cases in which an appeal was desired. Where there was no such adjournment the proper course was to move to set aside the order made in Chambers, so that the Judge might have the opportunity of delivering a judgment which would enable the Court of Appeal to understand the reasons for his decision.

[NOTE.—*The Imp. and Ont. sections appear to be virtually identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

THE QUEEN V. DOUTRE.

Petition of Right Act—Counsel fees, Right of action for—Retaining services of an advocate P. Q. before Halifax Commission.

The suppliant, a barrister of the Province of Quebec, in this case, was retained by the Government of Canada in the British interest before the "Halifax Commision," which sat at Halifax, under the Treaty of Washington, 1877, to arbitrate upon the difference between Great Britain and the United States, in connection with inshore fisheries, etc. The suppliant, by his petition, alleged that he was retained by a letter from the Department of Justice at Ottawa, and there was contradictory evidence of an agreement entered into at Ottawa between the suppliant and the Minister of Marine and Fisheries as to the amount to be paid to the suppliant for his services. The Judge who tried the case found that the terms of the agreement were as follows: "That each of the counsel engaged would receive a refresher, equal to the first retainer of $1000; that they could draw on a bank at Halifax, $1000 a month while the sittings of the Commission lasted; that the expenses of the suppliant and his family would be paid, and that the final amount of fees or remuneration to be paid to counsel would remain unsettled until after the award of the Commissioners." The suppliant received $8,000, and claimed an additional $10,000 under his agreement. The award in favour of Canada was over $5,000,000.

Held, per FOURNIER, HENRY and TASCHEREAU, J. J., That by the law of the Province of Quebec an action will lie at the suit of an advocate or counsel against his client for professional services rendered by the former to the latter, under a contract in that behalf; and when such a contract is entered into between a counsel of the Province of Quebec and the Crown, as in this case, that a petition of right will lie to recover upon said contract, and as the suppliant had proved that there was an agreement to pay a reasonable amount, to be determined at the conclusion of the business, in addition to the amount paid, that the amount of $8,000 which had been awarded to suppliant by the Judge at the trial, was a reasonable and just *quantum meruit* and supported by the evidence in the case.

Per SIR WM. RITCHIE, C. J.—1st. That the agreement between the suppliant and the Minister of Marine and Fisheries took place at Ottawa in reference to the services to be performed by Mr. Doutre in Nova Scotia, and therefore is not to be governed by the law of Quebec. 2nd. That the right of a barrister to maintain an action for counsel fees is the same in the Province of Ontario as in Nova Scotia ; that in neither Province could a counsel maintain an action for counsel fees, and therefore suppliant could not recover.

Per STRONG, J.—That there was no evidence of a contract to pay an additional amount of fees to suppliant, but there was evidence that the Crown had contracted to pay suppliant's expenses in addition to the fees paid, and for such expenses the suppliant was entitled to recover.

Per GWYNNE, J.—That as in England a counsel could not enforce a claim by Petition of Right for counsel fees upon an express contract, or or upon a *quantum meruit*, and that by the Petition of Right Act, sec. 19, clause 3, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of the Imperial Statute 23 and 24 Vict. c. 34, a Canadian counsel in the case of a contract with the Crown for his advocacy, cannot enforce such contract by Petition of Right, and therefore the appeal should be allowed.

Per FOURNIER and HENRY, J. J.—That counsel in the Dominion of Canada are entitled to sue for counsel fees.

Lash, Q.C., for appellant.

Laflamme, Q.C., for respondent.

THE QUEEN v. MCFARLANE ET AL.

Petition of Right—Government officer receiving tolls—Implied contract—31 Vict., ch. 12 (D.) —Con. Stats. Can. ch. 28—Negligent conduct of Government officer—Demurrer.

The respondents filed their petition of right in this case to recover from Her Majesty the value of certain logs, which became lost to them through the breaking of the boom in the Ottawa River, below the timber slide on the Madawasca, near Arnprior, and other damages and losses sustained by them, all, as alleged, through the improper and negligent conduct of the slide Master at that place, duly appointed by the Government under the provisions of ch. 28, Con. Stats. Can. and of 31 Vict. ch. 12.

The Attorney-General, on behalf of Her Majesty, demurred to the petition on the following grounds : 1. That Her Majesty is not liable for the losses sustained through the negligence of the slide master under the circumstances alleged in the petition; 2. That no contract between the suppliant and Her Majesty is shown in the petition ; 3. That no liability exists on the part of Her Majesty by reason of the insufficiency of the boom referred to in the petition ; 4. That Her Majesty is not liable by reason of any want of care in the selection or employment of the slide master referred to in the petition ; 5. Because the public works referred to in the petition, being placed under the control and management of the Minister of Public Works, Her Majesty is not liable for the negligence of the persons having charge of said works under him.

The demurrer was argued in the Exchequer Court, before HENRY, J., who overruled it, and held there was an implied contract on the part of Her Majesty, through her agent, to carry safely the logs, and that a petition of right would lie for the breach of that contract by the improper and negligent conduct of the slide master, and for any negligence in keeping in use imperfect and insufficient booms and other appliances.

On appeal to the Supreme Court of Canada—

Held (reversing the judgment of the Court *a quo*) 1. That the public works referred to in

the petition are by statute vested in the Crown in trust for the public, and that Her Majesty is not liable for the negligent, unskilful or improper conduct of persons appointed by the Government to have charge of said works.

2. That the claim set forth in the petition is a tort pure and simple, and that a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the sovereign.

3. That the slide master, in receiving tolls which it was his statutory duty to receive, did not thereby enter into any contract either express or implied, on behalf of Her Majesty to carry safely the logs through the slide, and that the Crown was not, in respect to the logs in question passing through the slides, a common carrier.

Lash, Q.C., for the appellant.

Bethune, Q.C., and *McIntyre* for respondent.

THE QUEEN v. CHRISTIAN A. ROBERTSON.

Petition of Right—Fisheries Act, 32 Vict. ch. 60 (D.)—B. N. A. Act, 1867, secs. 91, 92 and 109—Fisheries—License to fish—Miramichi River—Rights of riparian proprietors in granted and ungranted lands—Right of passage and of fishing.

On January 1st, 1874, the Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred upon him by sec. 2, 31 Vict., ch. 60, executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South West Miramichi River in New Brunswick, for the purpose of fly-fishing for salmon therein. The *locus in quo* being thus described in the special case agreed to by the parties: "Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in he enjoyment of his fishing under the lease granted to him, and put him to certain expenses in indeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing priviliges and for the expenses he had incurred.

By special case certain questions were submitted for the decision of the Court and the Exchequer Court held *inter alia*, that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries, consequently, had no power to grant a lease or license, under sec. 2 of the Fisheries Act, of the portion of the river in question; and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" *Held*, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise, apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of Canada on the main question involved: whether or not an exclusive right of fishing did so exist in the *locus in quo*.

Held, (affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries, under the British North America Act, 1867, sec. 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries, of the *locus in quo*, was void, because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.

2nd.—That although the public in Canada may have in a river, such as the one in question an easement or right to float rafts or logs down and a right of passage up and down, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing, or with the right of the owners of pro-

perty opposite their respective lands *ad medium filum aquæ*.

3rd.—That the rights of fishing in a river, such as is that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made, there is no authority given by the B.N.A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4th.—Per RITCHIE, C.J., and STRONG, FOURNIER and HENRY, J.J.—(reversing the judgment of the Exchequer Court on the 8th question submitted to that Court), that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marines and Fisheries to fish in streams running through provincial property would be illegal.

Lash, Q.C., for appellant.

Weldon, Q.C., for respondent.

From Ontario.]

LAWLOR v. LAWLOR.

Estate tail—Mortgage of—Reconveyance to mortgagor—Effect of—R.S.O., ch. 111.

Held, (confirming the judgment of the Court of Chancery), that a mortgage in fee, executed by a tenant in tail, bars the estate tail, and vests the fee simple in the mortgagee, and a discharge of such mortgage, executed by a mortgagee under the provisions of the R.S.O., ch. 111, does not revest the estate tail in the mortgagor, but does that estate which the mortgagee had. HENRY, J., dissenting.

Stewart Tupper, for appellant.

M'Intyre, for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO, EASTER TERM.

BEARINGER v. THRASHER.

Insolvency Act—Personal wrong—Discharge—Ca. sa.

The Court, affirming judgment of Cameron, J., *held* that a judgment against a bankrupt in action of seduction is a "debt due as damages for a personal wrong" within the Insolvent Act of 1864, and a discharge under the Act does not affect it. Also that a *ca. sa.* need not be returned and filed within a year from the judgment.

Bethune, Q.C., and *Clute* for appeal.

Holman, contra.

CHANCERY DIVISION.

Boyd, C.] [May 12.

MALCOMSON v. WADE.

Mortgage—Costs of sale, Bill of—Subsequent Incumbrancer.

In October, 1880, a sale was made of certain property under a power of sale contained in a mortgage. The solicitors of the mortgagee paid over to his agent in this country his principal money and interest, and detained, with the agent's sanction, a lump sum for their costs, but rendered no bill in detail. On the request of a subsequent encumbrancer the solicitors furnished him with a statement showing the settlement with their client's agent, but declined to furnish a bill of their costs in detail. The Master in Chambers directed the solicitors to deliver a copy of their bill of costs upon payment of the costs of such copy.

On appeal, BOYD, C., considered the circumstances of the case special, within the meaning of sect. 44 R. S. O., Cap. 140. He thought that the subsequent encumbrancer was entitled to see the items of the bill and judge whether to seek redress for any over-payment the mortgagee might have made to his solicitors.

Having regard to the state of the authorities no costs of appeal were given.

Shepley, for the appeal.

Small, contra.

Proudfoot, J.] [May 18.

TOWN v. BORDEN.

Will—Vesting—"Worldly estate."

A testator, by his will, "as touching his worldly estate" gave to his wife the use of all his personal property, for her support and the bringing up of his children; likewise he gave her the full use of his farm and buildings during her natural life, for her support and the bringing up of the

family, "and at her decease the whole of the personal and real property to be equally divided between my six children."

Held, the shares of the children vested on the death of the testator. *Baird* v. *Baird*, 26 Gr. 367, discussed and reconciled, and declared to be wrongly reported.

Held also, "worldly estate" includes, not only the corpus of the testator's property, but the whole of his interest therein.

Wood, (*Webster* with him), for the plaintiff.

Reynolds, for the defendant.

Proudfoot, J.] [May 18.

RE HOUSTON; HOUSTON v. HOUSTON.

Mortgage—Notice of payment off—Parol evidence.

Where a mortgagee comes in, under a decree for partition or sale and proves his claim, he cannot demand six months interest or six months notice.

Held also, following *Totten* v. *Watson*, 17 Gr. 233, that a parol agreement to pay a larger interest than that reserved by the mortgage is ineffectual to charge the land.

Small, for defendant J. Henderson.

Plumb, for the infant defendants.

Langton, for the plaintiff and other defendants.

Proudfoot, J.] [May 18.

RE CHARLES; FULTON v. WHATMOUGH.

Will—Vesting—Executory interests.

A testator left real and personal property to trustees on trusts to sell, and after providing for a certain annuity to the widow and for the education of the children, to invest and accumulate the surplus, and at the end of the period limited for the accumulation, to stand possessed of the same for the same trusts as were declared of the funds from which they proceeded.

He did not expressly limit the time during which the accumulations were to be made, but, in a subsequent part of the will, he directed that the trustees were to hold the trust moneys "after the death or second marriage of his wife, and his youngest child attaining 21 years," in trust for his sons and daughters in equal shares as tenants in common; and in the event of all his children dying, and in default of issue of such children attaining majority, he devised the whole estate, real and personal, to the trustees to be converted into money, and applied to founding an asylum for the dumb and blind.

Held, on a view of the whole scope of the will, so far as could be gathered from the confused language employed, and having regard to the fact that there was no direction that the division among the children was to be made "after the death or second marriage of his wife, and the youngest child attaining 21," but on the contrary the duties of the trustees with regard to the property were evidently not intended to cease then, and especially having regard to the devise over to the charity. The children, who survived the death of the wife and the majority of the youngest child, did not thereby and thereupon take absolute interests, but the estate continued in the trustees till the grand-children attained majority, and it was only then that the trusts could be deemed at an end, and failing the attainment of majority by the grand-children the property went to the charity; and the rule in *O'Mahoney* v. *Burdett*, L.R. 7 H.L. 388, and *Ingram* v. *Soutten*, ib. 408, applied.

Maclennan, Q.C., (*Langton* with him), for the petitioner.

Plumb, for the infant defendants.

W. Davidson, for the trustees.

[This same will came before the learned judge on a former occasion—23 Gr. 610: Rep.]

Proudfoot. J.] [May 18.

VILLAGE OF BRUSSELS v. RONALD.

Mortgage to municipality—R.S.O. c. 174, s. 454, sub-s. 5, (b).

In pursuance of a by-law, passed under the above section, and in consideration of a bonus granted thereunder, the defendant executed a mortgage of land, to the municipality of the Village of Brussels, conditioned for the carrying on of certain manufactures in the village for the term of 20 years, next ensuing the date thereof, without interruption for a longer period in any case than 12 months, and that he should at all times during the continuance of the said term of 20 years, have and keep invested in the said municipality at least $30.000. The by-law itself only required that the defendant should execute a mortgage for $10,000.

Held, the mortgage created a charge on the land to secure the performance of work and in-

vestment of money; but that it was not a charge for any specific sum, as none was mentioned in it, and it must therefore be taken to be a security for any damages the plaintiff might sustain from the failure of the defendant to perform his engagements, to an extent not greater than $10,000. For it could not have been the intention of the parties that upon failure, in some slight particular, to comply with the terms of the agreement running over a period of 20 years, the plaintiffs, (the mortgagees), would be entitled to foreclose, without an opportunity for the defendant to redeem; and though, as the mortgage was framed, it would appear to provide for a forfeiture of the estate on non-fulfilment of the agreement, this was a forfeiture which the Court would not enforce, but would relieve against, in accordance with the rule laid down by Lord Thurlow, in *Sloman* v. *Walter*, 1 Bro. C. C. 418.

Held also, R.S.O., c. 174, sect. 454, sub-s. 5 (b), authorises taking a mortgage in hand; the Act empowers the municipality to take security, and the word is wide enough to embrace a real security, and the legislature must therefore have intended to remove any incapacity in the plaintiffs to take or hold it.

J. A. McDougall, (with him *Shepley*), for the plaintiff.

Bruce, for the defendant.

Proudfoot, J.] [May 18.

GAIRDNER v. GAIRDNER.

Will—Vesting—Gift over—Contingency.

A testator, by his will, gave his homestead and certain personalty to his wife, while unmarried, for the maintenance and support of the family surviving him, until he or they should attain twenty-one, and afterwards for the maintenance of the wife for life. He then proceeded as follows:—"I further give and bequeath all my other personal and real estate, not hereinbefore mentioned, unto my executors in trust to dispose of and invest," and "upon my son Thomas attaining the age of 21 years, should he be my only child in trust, to pay to him and put him in possession of the said residue,"—but if there were more children, he directed that it should be divided amongst all, in the proportion of one part to a daughter and two parts to a son—"to be paid to him, her or them, by my executors, when they shall respectively attain 21." He then proceeded as follows:—"I further give and devise to my son Thomas, the homestead and farm aforesaid together with the household goods, etc., on the decease of my said wife, or at the time of her second marriage, should he have attained his twenty-first year. But should my said son be still in his minority, to be taken possession of by my executors, as aforesaid, till he attains his majority. And in case my son Thomas should not survive me or attain the age of 21 years, and in case I should have no other surviving child who shall attain the age of 21 years, or in case I should have no grandchild, then, and in that case," his real and personal estate was to be divided in certain proportions among the testator's brothers and sisters.

Held, Thomas took a vested estate, for that it did not appear that the testator intended it to be contingent either on his attaining 21 or surviving his wife.

Held also, the testator's intention was that the gift over should not take effect unless Thomas died under 21, without leaving a child. For as to the residue it was clear that, on attaining 21, Thomas was to have full possession and absolute control over it; and if there had been more children it was to be divided amongst all, and paid to them on their attaining 21, and language of that kind has always been construed as giving an absolute interest; and when a legatee, and the same rule must apply to a devisee, is to have the absolute control at a specified time, a subsequent gift over will be limited to take effect before the time; and that being the true construction as to the residue, the language must receive the same meaning as applied to the homestead.

Blake, Q.C., for the plaintiff.

Maclennan, Q.C., (with him *Loscombe*), for the defendant.

Proudfoot, J., Mr. Thom.] [May 22.

TORRANCE v. TORRANCE.

Taxation—Rule 442.

On the taxation of the plaintiff's costs the taxing officer disallowed the following items:—

1.—A charge of $2.00 for procuring a certain deed for use at the trial which the defendant's solicitor refused to admit. It was shewn that it

would have cost $30 to produce the person who had the custody of this deed.

2.—A charge of $7.73 for procuring from Montreal certain documents and a stock register whereby the expense of a commission to Montreal, to examine witnesses, was saved.

3.—"Instructions for statement of claim" was allowed, but "Instructions for reply" struck out.

The taxing officer held that he had power to tax charges for work done which caused a saving of expense only where the work was done between the solicitor on either side, and that one set only of instructions to plead could be allowed. On an application under rule 440, O.J.A.,

PROUDFOOT, J., allowed the first two items, but upheld the taxing officer's ruling as to the third.

Cattanach, for the application.

CHAMBERS.

Proudfoot, J.] [May 22.

BROWN v. BROWN.

Partition—Infants—Parties.

A partition suit commenced by summary application under Chy. G. O. 640.

The infants interested in the estate were joined as plaintiffs.

J. Hoskin, Q.C., as official guardian, moved to set aside the proceedings, on the ground that the infants should have been made defendants, and represented by the official guardian, under Chy. G. O. 640.

H. Symons for the plaintiffs.

Hoyles for the defendants.

PROUDFOOT, J., held that the infants were improperly joined as plaintiffs; that they should have been defendants, and represented by the official guardian; and directed a reference to the Master to fix the guardian commission as if he had been in the suit from the beginning. On consent of the guardian it was ordered that the proceedings taken for sale, if they prove to be regular, should stand, but this is not to be a precedent.

CORRESPONDENCE.

Supreme Court of British Columbia—The Thrasher Case.

To the Editor of the LAW JOURNAL.

SIR,—As one of that large and growing class from whom, as your readers, Mr. Alpheus Todd, (in his correspondence in the LAW JOURNAL of April 12th, under the above caption), invites a notice, I venture to address to you a few remarks upon his commentary in the *Thrasher Case.*

Previously to reading his letter I had always been under the impression that that well known writer was a close, careful, logical and impartial reasoner. It was with great astonishment therefore, I observed that his comment on the *Thrasher* judgment was *petitio principii* throughout. It begged the very questions adversely on which the judgment was mainly based. It did not attempt to enter into the details of the judgment it reviewed, or to discuss the reasoning on which it was founded. He merely states dogmatically that he differs from the conclusions of our judges on some of the constitutional issues of the case, and decides off-hand against the opinions of judges who have given time and research to the subject proportionate to its gravity and importance—who step by step have discussed with us in open Court our authorities, and the reasons for their conclusion; and, in the main point of their judgment we, as a bar, I may say almost without exception, concur. All his objections are fully met and disposed of in the judgment to which I refer your readers.

I have called the letter a review, but it is not a review. It is as though the writer should have said to himself:—"The judges have given their conclusions but the world will want to know what Mr. Todd thinks in the matter." It would at least have been expected of him that he would have discussed the question from the main point of view from which the the judges regard it; but like our Attorney-General here when arguing in Court, he entirely ignores the force given by so many of our Canadian judges to section 91—the chief controlling section and key-note of the B. N. A. Act. He ignores even its existence. Notwithstanding the multitude of authorities cited in the *Thrasher* judgment; he discusses none of them, and does not attempt to show how or by what authorities he arrives at his result.

Possibly he may consider himself bound in a strait jacket by previous public utterances in the direction in which his letter points, but that were unworthy of a candid writer of such good repute in search of legal truth. The change of his opinions in the *Letellier Case* should have taught him the lesson impressed by the judgment, that truth is many-sided; and opinions on a new Constitutional Act must vary from time to time as different and new aspects of it to different minds, under the ever varying circumstances of a new country, present themselves for decision.

The point raised, if not an entirely new one in B.C., has now been formulated in legal shape for the first time for the formal opinion of a court. It would probably not have arisen now if it had not been persistently forced on by the local authorities in spite of remonstrances well known and appreciated for the last five years past; they by their deliberate action and legislation in judicial matters, would have brought the Courts and the administration of justice to a dead-lock for the second time, but for the vigorous proceedings of the Court, which, as one of the judges said, had thereby once more opened the door of justice for all suitors in search of redress. Like many other, especially the earlier, writers on the Constitution of Canada he approaches his subject and gets at his conclusion crab-fashion, *i. e.* backwards; instead of boldly making for his port through the direct and open channel so carefully buoyed out by the framers of that organic measure—through section 91 of that Act, and the other sections in regular succession, he makes his advances first through a subordinate section (92). To that he attributes a completeness, definiteness and exclusiveness denied to it by the learned Canadian judges whose judgments paved the way and lead up to the present decisions of the B. C. Bench. The learned reviewer then construes the other sections by the reflected light thus obtained, and like our own Attorney-General in Court, can only view and construe the whole of the Act through the spectacles, or rather the blinkers, of section 92. Like that gentleman, he too entirely ignores the existence of section 91. And yet if he had really read any one of the judgments through he could not fail to have seen that section 91 was at least one main turning point of the Act. He shuts his eyes to the vast difference between the powers of the Legislature of a Province of the Colony of Canada (which the Dominion after all is) and the surpassing power of the Imperial Parliament, and claims for the Legislature of a single Province the legislative omnipotence of the Senate of an empire. The judgment does not say that the Colony (*i. e.* the Dominion) has no power over Court and Judges, although by no means the same or co-extensive with those of the Imperial Parliament. On the contrary it points to and insists upon the existence of the Dominion powers, subject to the limitations of the organic Act.

Of what use is Mr. Todd's reference to the Australian Colonies, which are full colonies, to whom the Colonial Laws Validity Act applies, as a measure of the legislative powers of a subordinate section or province of a colony which is governed by the B. N. A. Act? Section 91, which Mr. Todd so singularly ignores, is so fully treated in the judgment that it would weary you to repeat the long string of authorities there arranged on the subject. The pith of the judgment, as it affects the Supreme Court of British Columbia, may be shortly stated; affects, though not in the same degree, more or less, all provinces beside British Columbia that are governed by the B.N.A. Act. The Local Legislature of the Province, had assumed the right to authorise the Local Executive, exclusive of the Judges, to make rules of procedure in the Supreme Court of British Columbia, and they proceeded to make such. Among others a rule restricting all appeals to the full Court, to correct the decision of a single Judge at Nisi Prius, which had previously been unrestricted. This restriction they made in various ways, but especially to allowing the full Court to meet once a year for 1881, in which year a full Court had presumably already been held; thereby shutting the door against discontented suitors in want of a hearing before such full Court. The *Thrasher Case* was one of these. It was contended that this assumption was unconstitutional, and unless conferred on them by sec. 92, B.N.A. Act, it was so; for the Local Legislature could not go beyond the letter of that section and sub-sections. Everything not therein specified, it was contended, was of excusively Dominion cognizance, (sec. 91). The only sub-section of section 92 relied on was sub-section 14. Section 92 gives the Provincial Legislature power,

"to make laws in relation to matters coming within the classes of subjects enumerated in the sub-sections." Sub-section 14 enumerated "the administration of justice, including the constitution, maintenance and organization of Provincial Courts, and including procedure of these Courts." The Supreme Court of British Columbia, (omitting reference to other Courts), was "constituted" long before the union of the province with the confederation. It was "organized" before confederation by Imperial authorities, and after such union by the Governor General. It is "maintained" under the *Terms of Union*, sec. 10, by the Dominion. The Supureme Court of B. C., therefore, is not within the description of "those" Courts in which alone procedure is controllable by the Local Legislature. And, not being within sub-section 14, it is not within section 92 at all; and, therefore, *by the sweeping force of sec. 91 is reserved exclusively to the authority of the Dominion Legislature.*

The judgments in the main affirmed, among other things, that the aforegoing contention was correct. And yet Mr. Todd says not a word about section 91. Has he forgotton what Lord Carnarvon said in the House of Lords on the passing of the B. N. A. Act, upon section 91?

I am aware that the resolutions and speeches which preceded and accompanied the passing of the Act are merged in the Act, still it is interesting reading in days when, as I believe, Ritchie, C.J., remarked, section 91 is so much neglected by expounders of constitutional law:—"Just as the authority (Lord C. says) of the Central Parliament will prevail when it comes into conflict with the Local Legislature, so the residue of legislation, if any, unprovided for in the specific classification (which he had just explained) will belong to the central body. It will be seen under the 91st clause that the classification is not intended 'to restrict the generality' of the powers previously given to the central Parliament, and that those powers extend to all laws made 'for the peace, order and good government' of the Confederation; terms which, according to all precedents, will, I understand, carry with them an ample measure of legislative authority."

In *The Canada Insurance Company* v. *Parsons*, in appeal before the Privy Council in the last English Law Reports, Sir Barnes Peacock says, as our judges do, that section 91 cannot be taken without section 92, or section 92 without section 91.

Our Chief Justice, Sir M. B. Begbie, in the *Thrasher* judgment, (see pamphlet, page 13), after citing section 92 and its sub-sections, adds:—"It must throughout be borne in mind that by the immediately preceding section (91) every topic of legislation was swept into the power, the exclusive power of the Parliament of Canada, (viz., the Crown, the Senate and Commons of Canada), except only such matters as by this Act (not any one section of it but the whole Act) are exclusively assigned to the Local Legislature."

Mr. Justice Crease, in the same judgment on the *Thrasher Case*, (pamphlet, pages 40, 41, 42 and 43), cites numerous authorities, and enters very fully on the effect of section 91, as he terms it, "the sweeping character of section 91," and after setting forth the theory of the Attorney-General (almost identical with that of Mr. Todd: one might imagine they had borrowed their views from each other), he adds:—"In order to construe such a theory it became necessary to ignore section 91 and the Imperial Vancouver Island Act of 1859, and that the learned Attorney-General effectually did. But then what is the value of an argument on the British North America Act, which entirely ignores section 91?"

Hear Mr. Justice Gray (same judgment, pamphlet, page 63), on the same subject:—"As must necessarily be the case, the discussion turns mainly on the 91st and 92nd sections of the B. N. A. Act." Then, after showing that the Supreme Court of B. C. was not in "those" Courts mentioned in sub-section 14 of section 92, that learned judge goes on to say, (page 68:—"The general authority conferred by 91 being to legislate on all matters, and coming exclusively within 92, the 129th section steps in authorizing legislation as to the existing Courts in the Province by the Parliament of Canada or the Local Legislature, as one or the other under the B. N. A. Act is entitled," adding:—"The Parliamnet of Canada has legislated on the subject." And yet in the face of these authorities, and the judgment *passim*, Mr. Todd makes no reference whatever in his comments, to the value placed by the judgment under his review to section 91 of the Great Constitutional Act of Canada.

Of the uncalled for reflection Mr. Todd makes,

on the protests of the Judges against local legislation which they deemed injurious to Courts, suitors, bench, bar, and the administration of justice generally, it behoves me not to speak, save that possibly he may have received communication, perchance at Ottawa, perchance at Victoria or elsewhere, which has, may be unconsciously, had an influence in biassing his mind. He speaks, as a fact, of an appeal having been made from the Judges to the Imperial authorities against the action of the Legislature. It certainly is not so stated in the judgment, and if he has no other source of information how inaccurately must Mr. Todd have read that document! This makes it the more remarkable, that he should thus unprovokedly and unnecessarily, (for it has no bearing on the case), have gone out of his way to cast reflections on judges, to whom, in his exordium, he declares Canada is already so much indebted, and the chief of whom from Imperial authority by Royal hand obtained the accolade of Knighthood, as an acknowledgment of a long career of faithful service as a Judge. However, with any personal misapphrensions of any sort we have nothing to do. Such matters can scarcely be of value to those who, like the writer, find their interest chiefly in the solution of the great constitutional points of construction of the B.N.A. Act, raised in the *Thrasher Case*, (now I hear under appeal), points which affect the relations of every province to the Dominion, and consequently are of surpassing interest to every

ONE OF YOUR READERS.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The family laws of England and Islam.—*American Law Review*, May.
Evidence of foreign laws.—*Ib.*
Suzerainty: Medieval and Modern.—*Ib.*
Early English land law.—*Ib.*
Gifts *causa mortis*.—*Central L. J.*, May 12.
Presumptions of life, death and survivorship (continued).—*Ib.*
Estates by curtesy.—*Ib.*, May 19.
Repetition of telegraphic messages.—*Ib.*
Right of the prosecution to stand jurors aside.—*Ib.*, May 26.
Misconduct of counsel in argument.—*Ib.*
Contracts of carriers of goods.—*Irish L. T.*, May 20.
Savagery and civilization.—*Ib.*, (from *Times*).
Fractions of a day.—*Ib.*, (from *Justice of the Peace*).
Liability of Attorneys.—*Pacific L. J.*
A history of English judicature.—*London L. J*, May 6.
Wagers on horse races.—*Albany L. J.*

BOOK REVIEW.

A TREATISE ON THE LAW OF STOCK BROKERS. By Arthur Biddle and George Biddle, of the Philadelphia Bar. Philadelphia: J. B. Lippincott & Co. 1882.

This is an age of joint stock companies and syndicates; they are as numerous as Manitoba town lots. Old Blackstone talks about property, real, personal and mixed; but each individual hair of his horsehair wig would stand on end if he could return to this world and see how very "mixed" real property has become, when land is tossed about more easily, in these days, than was personalty in his day, and land syndicates and land companies carry on their operations mainly in the offices of stock brokers.

As the author says: "The transactions growing out of the sale and hypothecation of the securities dealt in at the stock exchange, already form, both in their number and magnitude, one of the most important branches of business in great commercial centres." It is therefore not surprising that a book should appear treating of the law governing the parties who, as agents, buy and sell such securities. This is the aim of the book, though it necessarily touches, more or less, upon the character of the thing sold and the questions arising out of the sale.

The first part of the book contains chapters treating of the stock broker—what he is; his connection with, and a description of the Stock Exchange and the Clearing House; also his relations with his principal, and with third parties. The second part deals with the sale of stock; part 3 with pledges thereof; and part 4 with the remedies of the parties for a breach of the contract of sale. The work has apparently been carefully done, so far as we have had an opportunity of judging, and like so many American text books the information is given in a pleasant, readable way.

TO CORRESPONDENTS.

A subscriber calls attention to an item in a country paper, wherein, after speaking of an action for slander, in which a good verdict had been obtained for the plaintiff, it is said: "There is a great deal of credit due Mr. ———, for the skilful manner in which he has directed the proceedings, etc." Our correspondent says that no doubt the item was written by the plaintiff's attorney, as a means of bringing himself before the public. We can scarcely believe that any professional man would be guilty of such an utterly objectionable proceeding, and we trust our correspondent is mistaken in supposing that the attorney either wrote or inspired the absurd item.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar :

Edwin Taylour, English Honors and Gold Medal ; Adam Johnston, Honor and Silver Medal ; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson ; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases :—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law :—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B.I., vv. 1-300 ; or
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic ; Algebra, to end of Quadratic Equations ; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Conntry Churchyard.
The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencemen. of the Second Punic War to the Death of Augustust

Canada Law Journal.

VOL. XVIII. JUNE 15, 1882. NO. 12.

DIARY FOR JUNE.

17. Sat. .. Burton and Patterson, J.J. Ct. of Appeal, sworn in, 1874, County Ct. Term for York ends.
18. Sun... *2nd Sunday after Trinity.* Earl Dalhousie, Gov. General, 1820. Battle of Waterloo, 1815.
20. Tue .. Toronto Oyer and Terminer. Accession of Queen Victoria, 1837.
21. Wed.. Galt, J., sworn in C.P., 1869. Longest day.
23. Fri.... Hudson Bay Co. Territory transferred to Dom., 1870.
25. Sun... *3rd Sunday after Trinity.*
28. Wed.. Queen Victoria crowned, 1837.
30. Fri.... Hon. J. B. Robinson, Lieut-Governor of Ontario. P. E. Irvine, Prest. of P. of Canada.

TORONTO, JUNE 15, 1882.

MR. JUSTICE FITZGERALD, of the Queen's Bench Division in Ireland, has been appointed a Lord of Appeal in Ordinary in England.

THE Divisional Court of the Chancery Division have disposed of the list of cases set down, at the rate, so far, of a little over two cases a day. Four or five cases still remain for the supplementary list commencing on June 20th. Judgment in most of the cases is reserved. Few points of very special importance appear yet to have come up. In *Ley* v. *Kidd*, however, an important point of pleading waits decision as to the degree of particularity with which a party has, under the Judicature Act, to indicate on his pleadings the nature of the title to land which he intends to set up. In this case also, the question of the proper construction of sect. 2 of R. S. O., c. 109, the Vendors and Purchasers Act is again before the Court. In *Sanders* v. *Malsburg*, as noted *supra* p. 206, the learned Chancellor expressed an opinion that this section was retrospective. In *Ley* v. *Kidd*, Mr. Maclennan, in an elaborate argument, contended that this could not have been intended by the Legislature. At the time of writing the hearing of this case is not concluded, but the Court have expressed an opinion that the current of decision on the point is so strong the other way that the Court of Appeal alone could over-rule them. At the same time the Court expressed themselves as much impressed by the force of Mr. Maclennan's argument, which, perhaps, placed the question in a stronger light than it had been placed in the former cases.

RECENT ENGLISH DECISIONS.

Of the April numbers of the *Law Reports* there still remain for review, 8 Q.B.D. pp. 317-444; and 7 P.D., pp. 5-20; while the May numbers, which have now arrived, comprise 8 Q.B.D. pp. 445-586; 7 P.D. pp. 21-60; and 19 Ch. D. pp. 516-649.

Of the cases in 8 Q. B. D. pp. 317-444, *Roberts* v. *Death*, and *Hornby* v. *Cardwell*, are cases on points of practice, and have already been noticed among the Recent English Practice Cases, *supra*, p. 101, and p. 136 respectively; and the first case requiring notice here is *Wigsell* v. *The School for the Indigent Blind*, p. 357.

MEASURE OF DAMAGES—BREACH OF CONTRACT.

In this case the owner of certain lands sold them to the defendants, who covenanted in the deed of grant that the land "shall be, and be kept enclosed on all sides abutting to the land belonging to W. (the grantor), with a brick wall or iron railing seven feet high." The Court held the plaintiff entitled to judgment against the defendants for breach of this covenant, and the question now before them was what was the proper measure of damages. The plaintiff contended that the measure of such damages was the sum it

would cost to erect the wall or fence. The Court held it was not so. They say, p. 360 of the judgment:—"the effect of bringing an action for damages" (instead of claiming specific performance of the covenant) "is to convert the right to the performance of the contract into a right to have compensation in money, and the rule in such a case, stated in its most general terms, is that the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed." And they held that to assess this difference on the cost of the wall or fence is inadmissible on principle because the element of the cost to the defendants might vary according to the material of which the wall or railing was composed, and therefore it could not be the measure of the difference to the plaintiff, "which is one thing—it represents in no sense that difference." Furthermore, reviewing the cases, they held that, notwithstanding that *Pell* v. *Shearman*, 10 Ex. 766, at first sight has the air of supporting the plaintiff's contention, yet this contention was not supported by authority. And they distinguished, p. 367, the cases in which, in actions upon covenants against incumbrances or to pay off specific incumbrances, it has been held that the damages are the diminution of the value of the estate by reason of the existence of the incumbrances, and if the contract is to pay off a specific incumbrance the owner may recover the whole amonnt although no claim has been made or damages proved. "In those cases there is a specific covenant to pay a specific pecuniary compensation. The right is to have that pecuniary amount, and there can be no question therefore but that the pecuniary compensation is the very thing to be recovered."

MINUTES OF PROCEEDINGS.

Of the next case *Reg.* v. *Justices of Cumberland*, p. 369, it may be worth while to mention that where a statute required justices, when they should refuse an application for a license to sell beer, to specify in writing to the applicant the grounds of their decision, and where a minute of the decision with the grounds of it was made and read out by the chairman in Court, in the presence of the applicant, but no copy was delivered to him, the Court held that, in the absence of any request by the applicant for a writing showing the reasons for the decision of the Justices, the notice was a sufficient compliance with the statute.

CLUB—"SALE BY RETAIL"—LICENSING ACTS.

In the next case, *Graff* v. *Evans*, p. 373, the question before the Court was whether, where a *bona fide* club, properly constituted, supplied liquor to members, at fixed prices, *but at a profit above cost price*, the money produced thereby going to the general funds of the club,—this was a sale by retail within the meaning of the Imp. Licensing Act, 1872, (cf. R.S.O., c. 181, sect 39). The Court held that it was not. Field, J., says:—"I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays is equal to more or less than the cost price. The transaction does not become the more or the less a sale on that account. . . The question here is, did Graff, the manager (sc. of the club), who supplied the liquors to Foster, (one of the members), effect a 'sale' by retail? I think not; I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. . . I cannot conceive it possible that Graff could have sued him for the price of goods sold and delivered. There was no contract between two persons, because Foster

was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section."

COVENANT IN LEASE—ALTERNATIVE REMEDIES FOR BREACH.

In *Weston* v. *Metropolitan Asylum District*, p. 387, the reddendum of a lease provided for the payment of £30 rent, and a like rent of £25 "in case any of the trades, occupations or things hereinafter covenanted not to be carried on or done upon the premises, shall be carried on or done." The lessee covenanted not to carry on the said trades, etc., and the lease contained a condition of re-entry if the said rent of £30, or the said further rent of £25, in case the same should become payable, were in arrears, or in case of a breach of covenant. A breach of the above covenant having occurred, the plaintiff sued to recover the premises as upon a forfeiture of the lease. It was contended that, looking to the reddendum, the effect of the provisions of the lease was that of an agreement that the lessees might carry on the trades, or do the acts specified, on payment of a certain additional rent, not that of an undertaking by the lessees not to carry on the trades, or do the acts in question; and that on the true construction of the lease there was no forfeiture. The Court, however, held, in the words of Mathew, J., that "the additional rent must be treated as a penal rent, but not as shewing that the carrying on of the trades in question is not a breach of covenant;" or in the words of Cave, J., that "the lease gives the lessor two remedies; not that both can be exercised together, because, if the forfeiture is insisted on, thereafter no increased rent can accrue, and, if the increased rent is received, any existing form of forfeiture is waived. They are alternative remedies in my opinion."

This is the last case in this number requiring notice here, *Haywood* v. *The Brunswick Benefit Building Society*, p. 403, having already ben noticed, *supra* p. 175, as reported in 51 L. J. N. S. (Q. B.) 73. Proceeding to the last of the April numbers, viz. 7 P. D. pp. 5–20, *Watson* v. *Watson*, p. 10, is a case of a peculiarly worded will.

WILL—GIFT OVER IN CASE OF DEATH.

The testatrix left property to her sisters Ann and Jane, and said in "case of the demise of either I hereby bequeath all and every portion of the said properto to the survivor for her sole use and benefit during her or their natural lifetime." The President pointed out that the use of the concluding words of the will, "during her or their natural lifetime," took this will out of the general rule as to cases where a bequest is made to a person with a gift over in case of his death (Jarman on Wills, Ed. 4, vol. ii. p. 732). And he held—"The words "during her or their lifetime" cannot be rejected, nor can they by any reasonable transposition, if that were allowable, be limited in their effect, though they are not strictly grammatical, of indicating that the estate must be taken by these persons for life only, and that there is an intestacy as to the reversion."

ADMINISTRATOR—INSOLVENT ESTATE—R. S. O. C. 46, S. 54.

In *in the goods of Wensley*, p. 13, the President, under an Imperial enactment, corresponding to the above Ontario enactment, granted administration of the estate of a deceased wife, to the creditors of the deceased husband, in order to enable them to obtain the deceased wife's share of the residuary estate of a third person, to which her estate had become entitled, in satisfaction of their debt.

This completes the review of the April numbers of the Law Reports. Turning now to the May numbers of the Law Reports, they are found to comprise 8 Q. B. D. pp. 445–586: 7 P. D. pp. 21–60; and 19 Ch. D. pp. 519–649.

CONSTRUCTION OF STATUTES—"OR" FOR "AND."

Of the first case in the above number of the

Q. B. D., *Metropolitan Board of Works* v. *Steed*, it is only necessary to say that it is a case on the construction of a statute in which the Court held "or" to mean "and," taking the rest of the sentence in which the word "or" occurred, the object and intention being prohibition, and the two things prohibited being coupled by the word "or."

REMOTENESS OF DAMAGE—LOSS OF RESALE.

The decision in *Thol* v. *Henderson*, p. 457, is best shown by the following extract from the judgment (Grove, J.)—"The question is, on what principle damages are to be assessed in this case, and whether the plaintiff is entitled to damages for loss of profit on a sub-contract which he had made for the sale of the goods. This sub-contract was not known to the seller at the time of the sale, but it was known that the plaintiff had purchased the goods for the purpose of resale. On these facts I think the damages ought not to be so assessed as to include loss of profit on the sub-sale. . . In the present case, all that was known by the defendant was that the goods were purchased with a general intention to re-sell them. If that knowledge is to be taken as the test of the seller's liability, I do not see why in any case he should not be liable, however speculative the resale may be. I do not think such knowledge brings the case within *Hadley* v. *Baxendale*, 9 Ex. 341." And he distinguishes the case of *Barries* v. *Hutchinson*, 18 C. B. (N. S.) 445, on the ground that there "the existence of the sub-contract was known to the seller at the time of the sale, or at all events, the fact was known to the seller that the goods were purchased for a specific purpose." It may be added that the head-note in this case appears incorrect in saying that "it was shewn that the goods were not procurable in the market."

PUBLIC MEETING—POLL.

The case of *Reg.* v. *Wimbledon Local Board*, p. 459, proceeds on the principle that a right to demand a poll is an attribute at common law of all public meetings, that any qualified person may demand a poll, and the meeting may be enlarged so that all persons duly qualified may come in and take part in the decision."

COSTS—ARBITRATION—"IN ANY ACTION."

In *Fergusson* v. *Davison*, p. 470, the question was whether, when the matters in difference in an action had been referred by consent to an arbitration, who had found a certain sum due to the plaintiff, this could be said to be a sum recovered in an action, so as to come within the meaning of Imp. 30-31 Vic. c. 142, sec. 5, which says that "if in any action" the plaintiff shall recover a sum "not exceeding a certain amount, he is not to have the costs of the action (cf. R. S. O. c. 50, secs. 343, 345). The Court held that it did; Brett, L. J., taking occasion to add that their decision did not apply to the case in which an arbitrator has made an award under a reference where no action has been commenced.

LIBEL—EVIDENCE—CHARACTER—RUMOURS.

Scott v. *Sampson*, p. 491, arose out of an action which probably most readers will remember. The action was for a libel published by the defendant of the plaintiff alleging that the latter had extorted a sum of £500 from Admiral Carr Glyn, by threatening to publish defamatory matter of Miss Neilson, an actress, then lately dead. It was tried before the L. C. J. and a special jury when the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff. In the case now before the Court the defendant claimed a new trial on the ground that the L. C. J. misdirected the jury in rejecting (i) evidence of the plaintiff's general bad character, (ii) evidence that rumours to the same effect as the libel complained of were in general circulation before the publication of the libel. The principal judgment is that of Cave, J., who reviews *seriatim* the authorities on the subject, which consist of decisions relating to the admissibility of (i) evidence of reputation; (ii) evi-

dence of rumours and suspicions to the same effect as the defamatory matter complained of; (iii) evidence of particular facts tending to show the character and disposition of the plaintiff. He then expresses his conclusions: "From this review of the authorities it will be seen that there is a considerable conflict of opinion, and before discussing them further it seems desirable to consider the principles underlying them. (i) Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others, unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estima- in which he was previously held. He complains of an injury to his reputation, and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know if the fact is so that he is a man of no reputation." He then observes that the objection of hardship to the plaintiff is removed under the present system of pleading, which requires that all material facts shall be pleaded, for a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends, who have known him, to prove that his reputation has been good. "On principle, therefore, it would seem that general evidence of reputation should be admitted, and on turning to the authorities previously cited, it will be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the judges who have expressed an opinion on the subject. (ii) As to the second head or evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. . . Upon the whole, both the weight of authority and principle seems against the admission of such evidence. (iii) As to the third head or evidence of facts and circumstances tending to shew the disposition of the plaintiff, both principle and authority seems equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have a good reputation, and to admit evidence of this kind is in effect, as was said in *Jones* v. *Stevens*, 11 Price, 235, to throw upon the plaintiff the difficulty of shewing an uniform propriety of conduct during his whole life. . Among all the cases which have been received there is not one which can be cited in support of the admisibility of this evidence."

DISCOVERY—SHORT-HAND NOTES—PRIVILEGE.

In the next case, *Norden* v. *Defries*, p. 508, the point in question was as follows. In an action of *Norden* v. *Norden*, an issue had directed to determine whether the present plaintiff had or had not executed a certain agreement. While the suit of *Norden* v. *Norden* was pending, the plaintiff commenced the present action, charging the defendants with a conspiracy to defraud the plaintiff, and to utter the agreement as binding upon him, knowing it to be a forgery. The plaintiff now resisted, on the ground of privilege, production for the inspection of the defendants of a print of the shorthand notes of the evidence, which had been taken for the plaintiff upon the hearing of a case of *Norden* v. *Norden*. The Court upheld the plaintiff. They say:—"We think that it does appear that the document came into existence with a view to and in contemplation of the present action, and in order to assist the plaintiff, who is a solicitor, in its conduct and prosecution. If the plaintiff has a cause of action against the defendants, it is manifest that it would be most important for the plaintiff to be enabled to submit to his counsel a full and precise statement of the evidence given by the defendants and their witnesses at the former trial. We

are, therefore disposed to give credit to the suggestion that the notes were intended to form materials for the guidance of the plaintiff and his counsel in the prosecution of the present action."

JUSTICE OF PEACE—DISQUALIFICATION FROM BIAS.

The case of *Reg.* v. *The Justices of Great Yarmouth*, p. 525, arose on a rule for a *certiorari* to bring up and quash certain orders made by certain Justices. It appeared that at a special session for appeals against a poor rate, the chairman of the municipalities, who was himself appellant in one of the cases for hearing, took part in the decision of all the cases except his own. When his own case was called on he left the bench and went to the body of the Court and conducted the case himself. In quashing the orders thus made on these appeals, by which a reduction was made in the valuation, Field, J., makes the following remarks: "The administration of Justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind. This principle is acted on in a case of less importance than that of the administration of justice, namely, the relation of principal and agent. Nothing is clearer than that where an agent takes a reward from the other side, or puts himself in a position of having a personal benefit out of the matter in which he is acting for his employer, it is not necessary to show any damage resulting, nor any bias in point of fact, it is enough to show that he has put himself in a position that is inconsistent with the fair and unbiased discharge of his duties. The reason for this is plain, for it is impossible to measure the effect, great or little, that such a bias may produce. In the case of *Harrington* v. *Victoria Dock Co.*, 3 Q.B.D., 549, (where under such circumstances, the Court held that the plaintiff, an agent, could not maintain an action for his commission, on the ground that the consideration for the contract was corrupt), this was established conclusively."

PRIZE FIGHT—AIDING AND ABETTING.

Of *Reg.* v. *Coney*, p. 434—a case reserved by the chairman of quarter sessions—it seems only necessary to say that, whereas the whole Court held that a prize fight is illegal, and that all persons aiding and abetting therein are guilty of assault, and that the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault, yet the majority of the Judges held mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight.

WILL—"ISSUE AND THEIR HEIRS."

Proceeding to *Morgan* v. *Thomas*, p. 575, this case involved the construction of the following will: "I give, devise and bequeath to my eldest son L. all my freehold property whatsoever and wheresoever situate, during his natural life, and after his decease to his lawful issue and their heirs for ever if any: if he should die without leaving any children born in wedlock, I give the said freehold property to my son E. and his heirs for ever." The question in dispute was whether the eldest son L. took an estate for life or an estate tale. Cave, J., held that the eldest son took an estate for life, followed by a remainder in fee to his issue as purchasers, if he had children born in wedlock, and a remainder in fee to his brother E. if he had no such children. He cited "the very important case" of *Montgomery* v. *Montgomery*, 3 Jones & Lat.

47, in which Lord St. Leonards lays it down as clearly settled that a devise to A. for life, with remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A. will give to the word "issue" the operation of a word of purchase, adding that where there are superadded words of limitation, and the issue can take the fee and there is only a limitation over in a contingent event, the issue will take as purchasers, according to *Lees* v. *Mosley*, 1 Y. & C. 589, following previous authorities. Cave, J., said that the case before him seemed exactly to meet this description.

IMPERATIVE STATUTE—EXECUTED CONTRACT.

The last case in this number of the Q. B. D. is *Young* v. *Leamington*, p. 579, which requires a brief notice. An Imperial enactment, decided to be not merely directory but imperative, required every contract made by an urban sanitary authority, over a certain amount, to be not only in writing but sealed with the common seal of such authority. The defendants, an urban sanitary authority, employed the plaintiffs to do certain work under a contract, in writing but not under the common seal. The plaintiff executed the work, and the defendants had the benefit of it. It was contended that under these circumstances the defendants were at all events liable to pay for the work at a fair price, and cases were cited to shew that corporations are liable at common law, *quasi ex contractu*, to pay for work ordered by their agents and done under their authority. The Court of Appeal, however, unanimously held these cases not in point, for that they had then to construe and apply an Act of Parliament, and if they were to hold the defendants liable to pay for what had been done under the contract, they would in effect be repealing the Act, and depriving the ratepayers of that protection Parliament intended to secure for them. Lindley, L. J., observes, p. 585: "It is not for this or any other Court to decline to give effect to a clearly expressed statute, because it may lead to apparent hardship."

The cases in the April number of the Probate Division, 7 P. D. pp. 21–60, are all of them either ecclesiastical or maritime cases, and do not appear to contain anything requiring notice here.

A. H. F. L.

THE bill for the admission of lawyers from Ontario to practice in Manitoba has now passed the legislature of that province, so that there will, probably, soon be a renewed exodus of members of the profession to that somewhat uninviting promised land. For our own part we would prefer to look on at a respectful distance. Still, as the latest advices from Winnipeg report everyone happy and prosperous, many more enterprising spirits will probably accept the invitation tendered by the legislature. There should be no difficulty in getting the City Solicitorship of Orbbyn City or the City of Manchester to begin with at any rate; although probably Winnipeg has more lawyers to the square acre than any other place on the face of the earth.

REPORTS

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

JACKSON V. LITCHFIELD.

Imp. O. 9, r. 6; O. 42, r. 8—Ont. Rules 40, 346

Judgment against partnership—Canon of construction of Judicature rules.

In an action against a partnership firm, judgment cannot be entered against an individual member of the firm who has made default in appearing.

[April 3, C. of A.—L. R. 8 Q. B. D. 474.

In this action the writ was issued against a partnership firm in the name of the firm, and was served in accordance with the rule and order on one of the partners. All the partners entered an appearance except one, against whom the plaintff moved to sign judgment separately for want of appearance.

The Divisional Court refused to allow this, and the Court of Appeal now upheld their decision.

BRETT, L. J.—For the solution of this question one must look at the Judicature Orders and Rules, since a proceeding against a firm by the firm's name was not known at common law; and it is a new proceeding. . . In all cases at common law, which are not provided for by the Judicature Acts, the proceedings are to be as they were before the Acts, and in all cases within the Judicature Acts, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can be to analogous proceedings before these Acts. . . There is no rule or order as to how judgment is to be entered where the writ is against the firm, therefore the way in which it is to be entered must be determined according to the canon rules of construction which I have enunciated. The rule at common law is that the judgment must follow or accord with the writ. Under the Judicature Act and its orders, the writ may be against the firm. Therefore, by analogy, the judgment must be against the firm. . . The only mode of putting such judgment into execution is by proceeding under Imp. O. 42, rule 8 (Ont. Rule 346). That rule provides that execution may issue "against any person who has been served as a partner with a writ of summons and has failed to appear." It is not necessary to determine now whether such service must be personal, though I still incline to think it must be. . . In my opinion the judgment in this action must follow the writ and be against the firm, and then execution may issue against the firm, and against every individual member of it, either without or after leave given to do so.

[NOTE.—*Imp. O. 9. r. 6, and Ont. Rule 40 are virtually identical; and Imp. O. 42, r. 8, and Ont. Rule 346 are identical.*]

SCOTT V. SAMPSON.

Imp. O. 19, r. 4—Ont. Rule 128—Pleadings—Facts not stated.

If in an action of libel a defendant desires to give evidence of general reputation, or any other material facts, he must shew upon his statement of defence that it is his intention to offer such evidence and to rely on such material facts.

[March 20.—L. R. 8 Q. B. D. 491.

The action was for a libel published by the defendant of the plaintiff, alleging that the latter had extorted a sum of £500 from Admiral Carr Glyn, by threatening to publish defamatory matter of Miss Neilson, an actress, then lately dead.

The case was tried before the L. C. J. and a special jury, and the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff.

The defendant now claimed a new trial on the ground that the L. C. J. misdirected the jury in rejecting (i) evidence of the plaintiff's general bad character; (ii) evidence that rumours to the same effect as the libel complained of were in general circulation before the publication of the of the libel.

MATHEW, J.—Under our new procedure, a statement of the material facts upon which the defendant intended to reply ought to have appeared in his pleadings. But there had been no notice upon the statement of defence in this case that evidence would be offered at the trial of the matters with respect to which the ruling of the L. C. J. is complained of, and on this ground I am of opinion that the evidence was properly rejected.

CAVE, J.—The defendant proposed to prove certain facts which he alleged were material, but these facts were not stated or referred to in the pleadings, as required by Imp. O. 19, rule 4 (Ont. Rule 128), and it appears to me that on that ground their rejection might have been supported, had they been material, which, however, I have said I think they were not.

[NOTE.—*The Imp. and Ont. Rules are virtually identical. The legal point which arose in this case regarding the admissibility of certain evidence, apart from the question of pleadings, is noted among the Recent English Decisions.*

SANDERS V. SANDERS.

Imp. O. 58, r. 5—R.S.O., c. 38, sect. 22.

Further evidence in Court of Appeal.

That, upon a case heard on admissions, those who advised one of the parties put a construction upon the admissions, which they have since found is not a right construction, is not a sufficient ground on which to apply for leave to adduce further evidence, on appeal, under the above section.

[Nov. 29, C. of A.—51 L.J.N.S. (Ch. D.) 276.

This was an appeal from a decision of Malins, V.C. The case was tried upon admissions. The question at issue was whether the plaintiff's

claim as tenant in common to certain property had been barred by the Statute of Limitation.

Higgins, Q.C., for appellant:—It must be assumed on the admissions that from 1833 to 1864 one tenant in common was in possession of the entirety without accounting. If the admitted subsequent payment for fifteen and a half years would raise a presumption of continuing payment, we ask for leave to adduce further evidence to prove that in fact for 20 years previously to 1865 there was no payment of a half of the rents.

BAGGALLAY, L.J.:- Mr. Higgins has applied for leave to produce additional evidence to show that these admissions do not give a correct view of the actual case, basing his application on Imp. O. 58, r. 5, (R.S.O. c. 38, sect. 22). The order gives the Court power to allow such evidence to be admitted, but only when there are special grounds, and not without special leave. What special grounds are there for the present application? That those who advised the defendant put a construction upon the admissions which they now find is not the right construction, and now want to turn round—but that is not a sufficient ground for this application.

JESSEL, M.R., and LUSH, L.J., concurred.

[NOTE.—*Imp. O. 58, r. 5, and R.S.O. c. 38, sect. 22, are, as regards the portion of them to which this case relates, virtually identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

From Quebec.]

BERGERON v. LASCELLE.

Mandamus — 41 Vict., cap. 3, sec. 63 (Q.) — 42-43 Vict., cap. 3, sec. 11 (Q.)—14 Geo. III., cap. 85, sec. 5 (Imp.) still in force—"City."

In May, 1880, B. applied to L., a license inspector, to obtain a license to keep an inn in the City of Three Rivers, producing to L. the necessary certificate, and tendering him one dollar under 41 Vict., cap. 3, sec. 63, and was refused a license. By the latter Act it was provided that, in addition to the fee of $1, a fee of $200 should be paid in the Cities of Montreal and Quebec, a fee of $80 in other cities; and a fee of $70 in all incorporated towns. This was repealed by 42-43 Vict., cap. 3, and no provision was made for other cities than Montreal and Quebec. B. obtained a mandamus to compel the issue of a license.

Held, that 14 Geo. III, cap. 85, sec. 5 (Imp.), is still in force, and that B. was not entitled to a license without payment of the fee of £1 16s. prescribed thereby.

Held also, that under the above mentioned Provincial Acts, L. could not have granted a license for the City of Three Rivers, as they apply only to Montreal and Quebec, and the City of Three Rivers was not within the meaning of "all incorporated towns."

McDougall, for the appellant.

Gerni, for the respondent.

BARSALOU v. DARLING.

Trade mark—Infringement.

The appellants manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows:—A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the obverse side. The respondents manufactured cakes of soap similar in shape and general appearance to the appellants', having stamped thereon an imperfect unicorn's head, being a horse's head with a stroke on the forehead to represent a horn. The words "Very Best" were stamped one on each side of the head, and the words "A. Bonni, 115 St. Dominique St.," and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellants' soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

Held, (HENRY, J., dissenting), reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of the appellants' trade mark as to mislead the public, and that the appellants were entitled to an injunction to restrain the defendants from using the device adopted by them, and that the appel-

lants were entitled to damages which were assessed at $100.

Beigue and *Geoffrion*, for the appellants.

Pagnuelo, Q.C., and *Cruickshank*, for the respondents.

From New Brunswick.]

MCSORLEY v. MAYOR OF ST. JOHN AND LANDALL.

Action of arrest by virtue of an execution issued for assesment under 41 Vict., ch. 9—Plaintiff did not own lands on account of which the assessment was made—Execution issued by Receiver of Taxes for City of St. John—Liability of receiver and corporation.

The 41 Vict., ch. 9, intituled "An Act to widen and extend certain public streets in the City of St. John," authorized commissioners appointed by the Governor-in-Council to assess the owners of the land who would be benefitted by the widening of the streets, and in their report on the extension and widening of Canterbury street the commissioners so appointed assessed the benefit to a certain lot at $419.46, and put in their report the name of the appellant, McS., as the owner. The amount so assessed was to be paid to the corporation of the city, if not, it was the duty of the Receiver of Taxes appointby the city to issue execution and levy the same. Appellant, although assessed, was not the owner of the land. After notice to pay, S., the Receiver of Taxes, on default issued an execution, and for want of goods the appellant was arrested and imprisoned until he paid the amount at the Chamberlain's office in the City of St. John. The action was for false imprisonment, and for money had and received. The jury found a verdict for appellant on the first count against both defendants.

Held, (reversing the judgment of the Supreme Court of New Brunswick), That the writ of execution having been executed by S., a servant of the corporation under their control, without any legal authority to justify its issue, and the corporation having adopted the act of their officer as their own by receiving and retaining the money paid, and authorizing McS.'s discharge from custody only after such payment, the verdict in favour of the appellant for $635.36, against both respondents on the first count should stand.

Weldon, Q.C., for appellant.

Dr. Tuck, Q.C., for respondents.

From Nova Scotia.]

CONFEDERATION LIFE ASSURANCE CO. v. O'DONNELL.

Policy, delivery of—Policy not counter-signed, effect of—Premium—Proof of payment of—Delivery of policy insufficient—Escrow.

On an action on a policy the appellant's company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to Halifax, to the agent at Halifax, to receive the premium and countersign the policy, and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed:—"This policy is not valid unless countersigned by——agent at——, countersigned this——day of——, ——agent." The agent, in his evidence, said he delivered the policy to W. O'D., the party assuring, not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered up the year to the 1st October, 1874. W. O'D. died the 10th July, 1873. The case was tried before McDonald, J., with a jury, and he gave judgment in favour of respondent for the $3,000, and this judgment was confirmed by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada it was held as follows:—

Held, (FOURNIER and HENRY, J.J., dissenting), that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore appeal should be allowed.

Per GWYNNE, J.:—That the instrument was delivered as an *escrow* to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid, and until the agent should, in testimony thereof, countersign the policy, and that their was no suffieient evidence to divest the instrument of its original character of an *escrow*, and to hold the defendants were bound by the instrument as one completely executed and delivered as their deed.

Beatty, Q.C., and *Lees*, Q.C., for appellants.

Thompson, Q.C., for respondent.

McDONALD V. LANE ET AL.

Replevin—Possession as against wrong doer—Chattels, title to—Co-mingling of logs.

This was an action of replevin for 1,440 logs cut on a lot of land known as the Johnston lot, in Horton Township, N.S. L. *et al* claimed title to the land in question under a paper title, and claimed that they had been cutting logs on the lot in question since 1875, and had built a barn on the lot, and also a camp. In 1877 the plaintiffs cut some 900 logs from the Johnston lot, and put them on the ice within a boom from an island from the main land. McD. claimed title under S. P. B. In 1873, at a town meeting it was resolved, without any authority, that certain persons appointed by the meeting be empowered to sell and give a warranty deed of lands called vacant lands, and under that authority sold to S. P. B. a certain tract of land. The deed of sale was accompanied by a power of attorney empowering S. P. B. *et al.* to ask, demand and receive compensation and damages from all persons liable for trespasses committed on the lot described in the deed. In 1877, McD., claiming under S. P. B., cut on this tract of land upwards of 2,000 trees, 500 of which were cut on the Johnston lot, which he also put on the ice outside and inside L. *et al.'s* boom, and then claimed the whole as his own, and resisted attempts of L. to remove them, thereupon L. took out a writ of replevin, under which, being unable to distinguish them all, they took all they could identify, and enough to make up the number cut on the Johnston lot and by themselves elsewhere.

Held, That McD. had shown no title in S.P.B. to the Johnston lot, and that acting under him he was a wrong doer; and that L. *et al* being in actual possession of the Johnston lot, the title to the logs cut by them as well as by McD. rested as soon as cut in L. *et al*, who were therefore entitled to cover the whole of the logs in this action of replevin.

Per STRONG, J.:—That all the party, whose logs are intermingled, can require is that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

Per HENRY, J.:—That where the goods of two persons are so intermingled that they cannot be distinguished, the law gives the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed.

Rigby, Q C., for appellant.

COMMON PLEAS DIVISION.

EASTER SITTINGS.

THE QUEEN V. O'ROURKE.

Criminal Law—Selection of jurors—Demurrer—Case reserved—Writ of error.

To an indictment for murder the prisoner pleaded a plea challenging the array of the panel, which plea was demurred to and judgment given is favor of the Crown by the learned judge holding the Court of Oyer and Terminer, who, at the request of the prisoner, reserved a case for the consultation of the Common Pleas Division.

Held, that this was not a matter to be reserved under C. S. U. C. ch. 112, and the case was therefore directed to be quashed.

Semble, per WILSON, C.J.:—That a Writ of Error was the proper remedy, and that it would lie to either the Queen's Bench Division or Common Pleas Division, and not to the Court of Appeal.

By the Dominion Act, 32-33 Vict., ch. 29, sect. 44, the relation of jurors in criminal cases is authorized to be in accordance with the Provincial laws, whether passed before or after the coming into force of the B. N. A. Act, subject, however, to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with the B. N. A. Act.

By the Provincial Acts, 42 Vict., ch. 14, and 44 Vict., ch. 6, the mode of selecting jurors in criminal cases as provided for by 26 Vict., ch. 44, the Act in force before and at the time of Confederation was changed by excluding the Clerk of the Peace as one of the selectors, and requiring the selection to be made only from those qualified to serve as jurors whose surnames began with certain alphabetical letters, instead of from the whole body of those competent to serve as previously required. The jury in question were selected under these Provincial Acts.

Semble, that the 31-32 Vict., ch 29, D., was not *ultra vires* of the Dominion Parliament,

and that the selection made in accordance with the Provincial Acts was valid.

Irving, Q.C., for the Crown.

Murphy, for the prisoner.

HEWSON v. MACDONALD.

Release of action—Notice of trial, after—Setting aside appeal to Divisional Court—O. J. Act Rule 414.

In an action for work done and materials provided, etc., to which the defendant pleaded never indebted and payment. On the cause coming on for trial, a settlement was effected by the defendant paying the plaintiff $2,500, and receiving a release from the plaintiff, expressed in the most general terms, to be in full of all demands. Subsequently the plaintiff—without having repaid the $2,500, and having refused to do so on the defendant's offering to give up the relsase if he would repay the money, contending that the said money payment was not the whole consideration for the release, but that the plaintiff, in addition, was to receive an appointment in the Civil Service worth $2,000 a year—gave notice of trial for the next assizes. The defendant thereupon applied to the Master in Chambers to set aside such notice, and stay all proceedings on the ground of the release being in settlement of all demands, or to let in the defendant to plead the said release; and the Master made an order setting aside the notice. The plaintiff appealed to Mr. Justice Armour, in Chambers, who, on the 11th April, made an order setting aside the Master's order, and permitting the defendant, but on that day, to plead the release, with leave to the plaintiff to reply, and directing the case to be entered for trial at the Assizes, on 17th April following. This order was taken out by the defendant and the release pleaded, and the case subsequently entered for trial and afterwards withdrawn. In Easter term following the defendant moved by way of appeal, against Mr. Justice Armour's order.

Held, that under the O. J. Act, rule 414, it was not essential that the appeal should be made within eight days from the making of the order on the time calendar.

Held also, that the defendant, by taking out Mr. Justice Armour's order and taking a benefit under it, would, according to the general rule and practice, be precluded from moving against it.

Held, however, that he could do so in this case because it was quite unnecessary to make it, as the plaintiff refused the defendant's offer to repay the money and get back the release, and it was not supportable in law, because the plaintiff, not having paid back the money, was not in a position to repudiate the release, and at the trial would be stopped from doing so; and also that the additional consideration set up being illegal, and the plaintiff being *particeps criminis*, he could not avail himself of it to defeat the release.

Held also, that the evidence showed that the defendant never agreed to any such alleged promise.

McMichael, Q.C., and *Ogden*, for the plaintiff.

McCarthy, Q.C., and *Marsh*, for the defendant.

CHANCERY DIVISION.

Proudfoot, J.] [June 6.

LAVIN v. LAVIN.

Conveyance by husband to wife.

The conveyance by a husband to his wife, even of all his property, has never been deemed to infringe any rule of public policy unless where it offends against the Statutes of Elizabeth, or the bankruptcy or insolvency laws. Post-nuptial settlements, like all other voluntary transactions, are valid and binding, so far as the parties are concerned, and can only be impeached as fraudulent as against others. Nor can such a settlement be less efficacious because the wife is to hold for the benefit of herself and the children. That is only another mode of carrying out the husband's duty to maintain and provide.

W. Cassels, for the plaintiff.

Bethune, Q.C., for the defendant.

Proudfoot, J.] [June 6.

MARTIN v. MCALPINE.

Fraudulent preference—Pressure—R.S.O. c. 118.

The bill in this case was by one execution creditor impeaching a judgment obtained upon a cognovit given by the defendant Farrell to the defendant McAlpine, another execution creditor, as offending against the act respecting the fraudulent preference of creditors, R.S.O. c. 118.

Held, inasmuch as the cognovit was not voluntarily given, but was the result of clear pressure

on the part of the defendant, the transaction was protected. *Brayley* v. *Ellis*, 1 Ont. R. 19, followed.

Moss, Q.C., (*Hopkins* with him). for plaintiff.

Blake, Q.C., for defendant McAlpine.

Ferguson, J.] [June 12.

Mortgage—Interest—Forfeiture.

DOWNEY v. PARNELL.

A mortgage, on which suit was brought, contained following proviso :—"Provided this mortgage to be void on payment of $2,500 of lawful money of Canada, with interest at 10% per annum, as follows : at the end of five years from the date hereof, with interest at the rate aforesaid to be paid half yearly ; but should default be made in payment of the principal money or interest, or any part thereof, respectively, then the amount so overdue and unpaid to bear interest at the rate of 10% per annum until paid."

Held, the above contract in regard to an increased rate of interest is not invalid, the matter being one of contract simply, and the contract not being in violation of any existing law; nor is it relievable against on the ground of forfeiture.

Hoyles, for the mortgagee.

Hoskin, Q.C., contra.

Boyd, C.] [May 31.

DAVIS v. WICKSON.

Fraudulent preference—Remedy—13 Eliz., c. 5—R. S. O., c. 118—R.. S. O., c. 119.

In this action the plaintiff, who had obtained judgment and issued execution thereon against the defendant Foster, claimed to have certain securities and a certain judgment obtained by the defendant Wickson, declared to be fraudulent and void on the ground of undue preferencce, and to have them set aside. He further sought to make Wickson account for the proceeds of the said securities received by him. Wickson obtained the securities and recovered the judgment as treasurer of certain trust funds of a certain public body to which Foster was indebted. It was admitted that the *corpus* of the property had passed beyond Wickson's control, and it was proved that before litigation he had paid over the money to his principals, who were not before the Court.

Held, the right of the plaintiff in these cases is to have any impediment removed or declared invalid which intercepts the action of his writs of execution. So long as the property of his execution debtor remains distinguishable, and so long as no purchaser for value, without notice, intervenes, so long may the Court award him relief against that property in the hands of fraudulent or voluntary holders. But when, as here, the first holder sells the property obtained from the debtor, and receives the proceeds in such a shape as that they cannot be ear-marked, then there is no jurisdiction to go beyond the further remedy which the Statute of Elizabeth prescribes, namely, that all parties to fraudulent conveyances, aliening or assigning thereunder, shall forfeit a year's value of the lands and the whole of the goods, whereof half shall go to the Crown and half to the party aggrieved, to be recovered by action of debt as mentioned in sect. 2 of the Act.

The omission of the word "him" at the conclusion of the affidavit of *bona fides* registered with a chattel mortgage has the effect of destroying the security as against an execution creditor who has seized while the goods remained in *statu quo*, but does not impair the instrument as between the parties.

W. Francis, (*Wardrop*, with him,) for the plaintiff.

Blake, Q.C., (*Thomson*, with him,) for the defendant Wickson.

W. A. Reeve, for the defendant Boustead.

CHAMBERS.

Boyd, C.] [May 8.

GROOM v. DARLINGTON.

Administration—Cases within G. O. ch. 638, 639—Practice.

Motion for the administration of the estate of Wm. D. Darlington by plaintiff, Henry Groom, who claimed to be a creditor of the estate, by reason of the support and maintenance by him of the testator's wife (in England), who had died shortly before the testator.

The testator, by his will, left $1,500 to the wife of the plaintiff, which had been paid to her.

The defendants (the executors) filed affidavits alleging:—1st. That the plaintiff should be put to proof of his alleged claim, inasmuch as he had not shewn that testator's wife had not separated from her husband, under circumstances which would disentitle her to support and maintenance. 2nd. That the legacy of $1,500 was intended in full satisfaction of any claim of plaintiff or his wife, if any such existed.

Held, that the questions raised were substantially such as would be raised in an action for alimony, and that such a claim as plaintiff's must be supported by *viva voce* evidence, and not merely by affidavit.

Motion dismissed, and an action directed to be brought to prove the claim, and for the administration of the estate. Costs of the application to be costs in the cause, and to abide the event of plaintiff proving claim or otherwise. Proceedings to be commenced within one month, or the motion to be finally dismissed with costs.

Winchester for plaintiff.

J. Hoskin, Q.C., for infant defendant.

R. Caddick, solicitor, for defendants (the executors).

Mr. Dalton, Q.C.] [May 26.

HOOD v. MARTIN.

Agreement to sell land—Special endorsement of writ—Rule 80, O. J. A.

A motion for judgment under Rule 80, O. J. A. The writ was endorsed for the price of land which the plaintiff had agreed to sell to the defendant. The defendant refused to carry out the contract of sale, alleging that he had made a mistake as to the land which he had agreed to purchase, in that he supposed he was purchasing another lot. He did not allege that the plaintiff was in any way accountable for the mistake. The plaintff moved for judgment under Rule 80, O. J. A., on the ground that there was no defence to the action.

MR. DALTON, Q.C.—I think the claim here cannot be effectively specially endorsed on the summons. A claim for the price of land *sold* and *conveyed* might be so endorsed, but it must be on an executed and performed consideration. Here no property passed—the plaintiff still owns the land. There is no debt, and what the plaintiff is entitled to is damages against the defendant for not carrying out the contract.

Motion dismissed with costs.

J. H. Macdonald for the motion.

Meek, contra.

Proudfoot, J.] [June 6.

RE ALLEN; PEACOCK v. ALLEN.

Administration—Practice—G.O. Chy. 638, et seq.

An administration suit under G. O. Chy. 638. The defendant was the agent for the plaintiff in selling a patented invention, and the testator, by instrument under seal, became surety for him and then died, appointing by his will the plaintiff and defendant his executors.

The plaintiff claiming to be a creditor of the estate, under the agreement of suretyship, obtained from the Master at Woodstock an administration order, which also directed that if any debt was found due to the plaintiff it should be paid by the said defendant. Letters from the defendant in June 1872, admitting a debt of $260, were put in on appeal.

PROUDFOOT, J, thought the case a simple one and within the terms of G. O. Chy. 638, *et seq.*, that the letters admitting the debt of $260 established a *prima facie* case in the plaintiff's favor, that the case was one peculiarly of equitable cognizance, being between a principal debtor and his surety. Before the recent changes in the law the defendant would have had no right to trial by jury, and he thought the recent legislation did not extend that right. As there did not appear to be any assets he did not think that the plaintiff could have paid himself, but independently of the question of assets the proceedings in this case were regular, and similiar to that found in *Re Greaves, Gray* v. *Tofield*, 18 Ch. D., 551. Neither did the Statute of Limitations operate as a bar; the agreement, dated 1871, being under seal, there could be no limitation under 20 years. He declined to order the reference elsewhere than to Woodstock on the ground that the Master had prejudged the case, as it did not appear that the Master was under any disability from professional or fiduciary relations with any of the parties, and it could not be as-

sumed that the Master would not properly discharge his duties.

Appeal dismissed with costs.

Meredith, (London), for appeal.

H. Cassels, contra.

Proudfoot, J.] [June 6.

NORVALL v. CANADA SOUTHERN RY. CO.

Costs--Defence—Time of raising—Defence.

This case is reported on page 98.

Cattanach now moved to set aside the order making the decision in the Court of Appeal an order of the Court of Chancery, in so far as it directed the defendants to pay the costs of the appeal.

H. Cassels, contra.

PROUDFOOT, J.—The cases to which I was referred, of *Clark* v. *Smith*, 9 Cl. & F. 143; *McKenny* v. *Ramsay*, *Ib.* 818; *Attorney-General* v. *Cox*, 3 H. L. C. 278, were instances of where the costs of the proceedings were disposed of by the House of Lords, and are no criterion as to the right to costs where the appellate Court is silent on the matter. The case of *Sams* v. *Johnston*, L. R. 6 C. P. 451, was also referred to as being in favour of the defendants; but on consideration it seems to me to be in favour of the plaintiff.

The Supreme Court, by making a disposition of these, must be assumed to have intended to allow the disposition of them by the Court below to remain.

Motion refused with costs.

Proudfoot, J.] [June 6.

WIGLE v. HARRIS

Statement of claim, Enlargement of time for delivery of—Notices--Rule 42.

The Master at Chatham made an *ex parte* order allowing the plaintiff two months further time to file his statement of claim.

On appeal. PROUDFOOT, J.—I think such an order ought only to be made on notice; and as any person affected by an order of the local Master may appeal to the Judge in Chambers under Rule 428, it was not necessary to apply to the local Master to rescind his order.

Appeal allowed with costs.

Proudfoot, J.] [June 6.

CAMERON v. LEROUX.

Partition—Commission—G. O. Chy. 643.

This was a partition suit. The Master at London allowed $300 for commission, apportioning the same as follows:—The plaintiffs' solicitors, $235; guardian of infants, $25; widow, $40; and certifying that the greater part of the work and responsibility of the conduct of the case was upon the plaintiff; that he had carefully considered the amount which the guardian could tax, if taxed costs were allowed, and specified the work done by the guardian in his office.

The charges of the agents of the guardian amounted to $25.

PROUDFOOT, J.—I do not think that the sum allotted to the guardian should be measured only by the work done in the Master's office, he has to acquaint himself with all the facts of the case besides, which his clients cannot give by reason of their infancy, and which have to be gathered from relations and in many cases from other more impartial sources. He has not, as in the ordinary cases of a solicitor for an adult, merely to carry out his client's wishes, but he has to inform himself of what is best for them and to decide for them.

The guardian expressed his willingness, without prejudice, to accept $50 for his share of commission, and without considering whether he might not be entitled to a larger sum, I think this is a reasonable offer and ought to be accepted.

The report will be varied accordingly.

Proudfoot, J.] [June 6.

MARTIN v. LAFFERTY.

Service out of jurisdiction- When order to proceed necessary—Rule 45, O. J. A

Held, (affirming the Master in Chambers), that an order to proceed is unnecessary where the writ of summons and statement of claim have been served out of the jurisdiction, except in cases under parapraph (*e.*) of Rule 45, O.J.A.

LAW STUDENTS' DEPARTMENT

Scholarships.

Whilst there will be differences of opinion on the subject brought forward in the following letter, there is much sound sense in what our correspondent advances, and a healthy "ring" about his remarks which must commend them to all.

To the Editor of The Law Journal.

Now that the examinations are just over, it is, perhaps, a seasonable time for considering the most desirable manner of conducting them that the best possible results may accrue.

The advisability of offering scholarships has, for a number of years past, been engaging the attention not only of University Senates but of students generally, and it is getting more and more to be the opinion of educational men of modern thought that this practice does not conduce to any great permanent good.

Scholarships and rewards of such nature are intended as a stimulus to students to be proficient in their work. No one would for a moment pretend to say that there ought not to be an incentive to encourage candidates to exert themselves, but the most laudable, and at the same time most profitable for the student is the real satisfaction of being successful for his profession's sake- *i. e.*, for the position which his legal knowledge, together with his natural talents, will give him in that profession and consequently benefit it thereby; but the student who requires an encouragement, so mercenary, so prone to small mindedness as the former, to spur him on to exertion and to success might better, both for himself and the profession, have finished its study with his primary examinations and directed his attention to pursuits in which personal emolument is the principal object, the chief good.

This motive of "reading for a scholarship" is, unquestionable a selfish and unworthy one, but I think I am stating the fact when I say, that with the large percentage of scholarship winners that (if not the still less worthy one of surpassing some individual man) was their direct aim and sole immediate ambition; but how often do we find their genius (?) ending with the "capture" of it!

It is a notorious fact that, as a rule, brilliant "examination men" are soon outstripped in actual practice by their less fortunate, (if it be a misfortune), comrades who comprise the class from which, as a general thing, spring those who attain the highest professional distinction. The fact of their taking a scholarship is by no means a criterion of any extraordinary inborn talent, when we consider that the majority of these men months before abandoned their office duties entirely, and settled down to a systematic course of mechanical "plugging," while seemingly less proficient candidates, taking their examinations regularly as they become due, remained at their post almost to the very hour of examination and thus acquired practice which, although it scores but little on their papers, is none the less necessary to their legal education, none the less necessary to their proficiency as students of the law, and experience, (which is, perhaps, more beneficial to them than the extra "cramming" in after years in the active practice of their profession. With this class of candidates, moreover, their knowledge is too apt to be superficial, and I believe it is no exaggeration to say that the greater number of scholarship men rely more upon their memories than upon any keen perception into the intricacies of legal study, and that which they are unable to fathom by patient reasoning they commit by rote, and is transmitted to the examination paper as mechanically as a phonograph talks.

The tendency of this practice is :—

1.—To create among studeuts a rivalry which has its origin in the smallest and most selfish desires.

2.—To beget a false and unmanly ambition.

3.—To generate petty and ignoble aspirations.

4.—To foster anything but correct ideas as to ability and excellence in the minds of those who are shortly to take their places in the ranks of a profession whose improvement should be the highest aim of every man who has the privilege of being a member of it.

Yours, etc.,

Professional.

Hamilton, May 23rd, 1882.

CORRESPONDENCE.

Administration of Justice in British Columbia.

To the Editor of the Law Journal.

Sir,—Mr. Alpheus Todd's article in your number of May 1st, "on the Supreme Court of British Columbia," referring to the judgment of that Court on the constitutional questions raised in the *Thrasher Case*—commands attention from the respect that is due to the writer's name. It is important, therefore, to see whether he has examined the case with the care and consideration due to his standing as an authority on constitutional subjects—bearing in mind, however, this marked distinction, which must pervade every question involving the construction of the "B. N. A. Act, 1867," namely—that the Constitution of the Dominion is based not only upon the rights and privileges which as part of our Common Law inheritance, and from long usage and practice as British subjects and colonists, as well as in the case of Canada from Treaties, we are entitled to and possess, but also upon the written compact which of our own accord we

have adopted, and which at our own request has been sanctioned and embodied by the highest authority known to British subjects, in an Act of the Imperial Parliament.

It is not incompatible that on the first branch of such a constitution an author may be of the very highest authority, as involving the exercise of research, erudition, unwearied industry, vast historical knowledge, and accurate powers of deduction; while on the second, which more properly is limited to an analysis of a written instrument—the construction of a statute—his views, from the want of long years' of legal training, may not be equally correct. The first has probably given to his mind, a broader range it may be, but coupled with it a tendency to look at expediency or policy; the latter involves a mental process of reasoning under fixed legal rules leading to the necessary logical sequence.

The distinction will be seen at once by reference to that part of Mr. Todd's letter, at page 182, asserting the competency of the Local Legislature to regulate procedure in the Supreme Court of British Columbia, which assumes, that because the Imperial Parliament in 1870 and 1875 claimed this power, and because the Australian Colonies exercised it in their legislation with reference to their courts when they so desired, therefore "a similar power must be admitted to exist in all Colonial Legislatures that have been authorized to regulate the administration of justice in the particular Colony or Province." The "omnipotence of Parliament" may well apply in both those instances. The Imperial Parliament is under no restraint save that its judgment dictates.

The Australian Colonies, as to their internal legislation, are autonomous save so far that it may not conflict with Imperial Legislation or sovereignty. They have entered into no compact by which, as between each other, and subject to a general union their powers are limited, there is no agreement ratified by the highest authority by which they have severally relinquished rights they otherwise possessed. The very use by Mr. Todd of the expression "that have been authorized" shows the inapplicability of his illustration, because the term itself indicates a concession and limitation of authority which must be sought for in the instrument that concedes it. Thus such legislation by the Imperial Parliament, or by the Austalian colonies, is no argument that similar legislation would consequently be legal in the Local Legislatures of the Dominion; nor is a similar deduction necessarily to be drawn from the fact that the Legislature of Ontario has exercised such a power. The statutes of that Legislature are entitled to the greatest respect on account of the many able and distinguished men who form it, but it does not necessarily follow, nor can it be conclusively assumed, that their legislation in that direction is nowhere in the Dominion to be questioned. The validity of their acts in that line can only be determined when the point is raisd in the Courts of Ontario, and disposed of either by those courts or the Supreme Court of Canada.

Nor is it clearly perceptible what the Imperial "Colonial Laws Validity Act," referred to by Mr. Todd, has to do with the question. That statute was passed in 1865, previous to Confederation, and had reference to Colonies acting independently of each other, in direct communication with the Imperial Government, and subject to its immediate supervision, not to the subordinate sub-divisions of a colony acting under powers specifically detailed in a subsequent Imperial Statute, and subject to the control of an intervening authority between themselves and the Imperial Government, the powers and duties of which intervening authority are again specified and detailed in the same subsequent Imperial Statute. However much that Colonial Laws Validity Act may apply to the general Government of Canada and the Legislation of the Dominion Parliament, it can have no possible bearing upon the Legislation of the separate Provinces since Confederation. What they do not find in the British North America Act, 1867, they need not look for in that. Coming from a lesser authority than Mr. Todd, to a legal mind, such a reference would seem like a blind—the semblance of learning without its substance.

It will not be necessary to follow the writer through his article. It is obvious that he has given to the several judgments but a very cursory reading, and with a preconceived opinion in the opposite direction. He asserts but does not reason, and entirely ignoring the fact that there had been no previous decision by any Court on the immediate point raised, boldly assumes that *Valin* v. *Langlois* disposed of it, though in that able judgment the point was not even under advisement; I doubt, indeed, if the distinguished Chief Justice of Canada who presided in that case would himself have treated the question in so lofty and summary a way. Whether right or wrong the judgments delivered by the several judges in the *Thrasher Case* are sufficiently explicit. If they cannot be sustained by what is therein contained, those judges must be manifestly in error. The legal estimate of the Courts and Bars of the several Provinces and the final opinion of the Supreme Court of Canada must ultimately decide.

Though Mr. Todd has not deemed it necessary to quote any authority, there really is one to which he might have referred as apparently leading to a conclusion different from that of the B. C. Judges, not in the immediate adjudication itself, but in the line of reasoning urged by the Court; I mean *The Citizens Insurance Co.* v. *Parsons*, L. R. 7 App. cases, which judgment was delivered in November last, but only lately received in this Province I have said "apparently leading" because I think it capable of explanation. In delivering judgment Sir Montague Smith referring to the distribution of

powers between the Dominion Parliament and the Local Legislatures, at page 107, says :—

"The scheme of this Legislation, as expressed in the first branch of section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures. If the 91st section had stopped here, and if the classes of subjects enumerated in section 92 had been altogether district and different from those in section 91, no conflict of legislative authority could have arisen. The Provincial Legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in section 91 ; hence an endeavour appears to have been made to provide for cases of apparent conflict, and it would seem that with this object it was declared in the second branch of the 91st section 'for greater certainty but not so as to restrict the generality of the foregoing terms of this section,' that, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies, in its grammatical construction, only to No. 16 of section 92.

"Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases when this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject of 'marriage and divorce' contained in the enumeration of subjects in section 91 : it is evident that solemnization of marriage would come within this general description. Yet 'solemnization of marriage in the Province' is enumerated among the classes of subjects in 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the Legislatures of the Province."

Probably the learned Judge could not have selected out of the classes and powers enumerated in sections 91 and 92 any one class or power of more apparent comprehension within and identity towards each other, or seemingly more likely to create a conflict of legislation. Yet which, when read by the light of the causes that led to the division and separate assignments of the power of legislation thereon, exclusively to the general Parliament on one branch and to the Local Legislature on the other, could more conclusively have proved not only the reason but the wisdom of the distribution, and that, by "this sharp and definite distinction," conflict of legislation would be avoided ; and that there is not the slightest occasion for torturing the Act to reconcile its, at first view, apparently different parts. The assignment on the first branch arose from a determination in the framers of the constitution that on this important subject of the *contract* of marriage and its dissolution or divorce there should be throughout the whole Dominion unity of legislation. That there should not be polygamy or Mormonism in one Province, and in another incidents attached to the contract or facilities for its dissolution inconsistent with a healthy moral tone or the regulations of well organized society. This power, therefore, was limited *exclusively* to the Parliament of the whole, but the mode or ceremony by which you might enter into the contract was entirely a different matter. Throughout the different Provinces, on that subject, the sentiments were essentially different. In some it was regarded by the main body of the people, in Quebec for instance, as of a religious character ; in others by large numbers as of a civil characted ; and in all the right was claimed to have the ceremony celebrated as they themselves determined. Yet the time had been in those Provinces when the law only permitted that ceremony to be performed by the ministers of the Church of England or of the Roman Catholic Church. Years of successive legislation had given to the ministers of other Churches and other denominations the power, and in some instances, to such extent was it carried, that individual ministers of newly formed and previously unknown and unrecognized congregations were authorized by name, by personal legislation, so to do. Sir Wm. Ritchie, C.J., can recall the legislation of this nature in the Provinces of Nova Scotia and New Brunswick to which reference is now made.

This was a power, therefore, the separate Provinces did not choose to forego or place in any other hands whatever ; each Province was to speak for itself, and legislate for itself *exclusively* as to the solemnization of marriage. Thus it is impossible there can be any conflict and reversing the words of Sir Montague Smith, it was "foreseen that this sharp and definite distinction had been and could be attained, and that none of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into or were embraced by some of the enumerated classes of subjects in section 91." A similar analysis will show that with reference to every other class of subjects and assignment of powers in the two sections, the same rule will apply. The word "exclusively" was intended to prevent conflict, and was intentionally used. It was, moreover, intended to give to the general Parliament the great preponderance of power. Whether that was wise or not, or whether the

popular feeling of to-day may run in a different direction, is not the question. At the time of the Quebec Convention, in 1864, it was believed that much of the difficulty in the United States arose from the weakness of the general Government, and to obviate the occurrence of such a difficulty in the Dominion it was proposed to strengthen ours. It was therefore that the word "exclusive" is so repeatedly used in sections 91 and 92 in defining the separate powers.

But now it is sought to be inferred that the framers of the Constitution did not know the meaning of the word, in fact, that the word "exclusive" does not mean exclusive. As a matter of history the men who constituted the Conventions are well known. They came not from one Province but from all, and were considered by their several Provinces as men sufficiently competent to be entrusted with the onerous duty they were sent to discharge; but, perhaps, as a matter of history, it may not be known that these two sections, 91 and 92, claim an origin even antecedent to that Convention. In 1839 or 1840 Lord Durham had contemplated the union of Upper and Lower Canada with the Maritime Provinces, and the outlines of a measure had at that time been prepared under his direction, I think by the Hon. Henry Sherwood, Attorney or Solicitor-General. This measure had the benefit of the ability and consideration both of Lord Durham and his able Secretary, Charles Butler, then well known both in Canada and in England. That portion of the draft embracing these two sections was laid before the Quebec Convention in 1864, by Sir John Macdonald as Mr. Sherwood's draft—was fully examined and discussed, and was substantially, if not almost entirely, adopted. In its present form it was for three years under the consideration of the Legislatures of the several Provinces and the Imperial Parliament until its final enactment in 1867. For forty years, from Lord Durham's time down to the present, it has been under the consideration of every leading man in Canada, and of the most distinguished statesmen in England, and it has been at last discovered that not one of them knew the meaning of the word "exclusive."

It may be desirable that this word should be obliterated or modified, but while it lasts let us treat it honestly like an English word. It is this word, in its English sense, which apparently has governed the opinions of the learned judges in British Columbia on the constitutional questions raised in the *Thrasher Case*.

On the reasons assigned in those judgments they must rest. It is to be hoped that in the public interests those reasons may be gravely considered, and that Mr. Todd himself will not too hastily lend the weight of his name to sanction a conclusion which, after more reflection, he may perhaps find he has erroneously formed.

Your obedient servant,

AN EXILE.

Victoria, B.C., May 16th, 1882.

SUPREME COURT TARIFF.

Some changes have recently been made in the Rules of the Supreme Court as to the tariff, to which it is desirable to call attention. By the item amended by Rule 81, parties were, it is said, frequently paid for work not actually done, or at least paid too much. The work will now be paid for only when necessarily done, and at a reasonable rate. Rule 82 will probably make more general among the profession in Provinces not accustomed to conducting work on the agency plan, the employment of agents. There was an unwillingness on the part of solicitors to employ an agent when no special item in the tariff apparently covered the disbursement they would be put to by so doing. They will now have no excuse for not conducting all their business in the Registrar's office through agents; and solicitors, in rendering bills to clients, will not require to make so many explanations.

These rules are as follows:

RULE 81.—It is hereby ordered that Schedule D. annexed to the Rules of the Supreme Court of Canada be amended as follows:—Instead of the item, "Printed case, per folio of 100 words, including correcting, superintending, printing and all necessary attendances, 30c," the following allowances shall be taxed by the Registrar: For engrossing for printer copy of case as settled, when such engrossed copy necessarily and properly required, per folio of 100 words, 10c.; for correcting and superintending printing, per folio of 100 words, 5c.

RULE 82.—It is hereby ordered that an allowance shall be taxed by the Registrar to the duly entered agent in any appeal, in the discretion of the Registrar, to $20.00.

These Rules bear date June 3, 1882.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending 27th May and 3rd June, contain Ants, *Westminster;* Journals of Caroline Fox, *Quarterly;* A Word about America, by Matthew Arnold, *Nineteenth Century;* Across the Yellow Sea, Sunrise and Moonrise, *Blackwood;* Life in Old Florence, *Fraser;* A Little Pilgrim: in the Unseen, *Macmillan;* Boar Hunting in the Ardennes, *Belgravia;* Rossetti, *Athenæum;* Slavery in Hong Kong, *Spectator;* Emerson, *Saturday Review and Spectator;* The Literature of Tiflis, *Public Opinion;* with instalments of "Lady Jane," "Prudence Hart," and "The Ladies Lindores," and selections of poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,3000 pages a year), the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

The following is the *resume* of the proceedings of the Benchers during Easter Term, published by authority :—

During this term the following gentlemen were called to the Bar, namely :—

George S. Lynch Staunton, with Honours, awarded a Silver Medal; Arthur O'Heir, Thomas Henry Guscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Francis Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely :—

William Burgess, jr., Thomas Henry Guscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Conntry Churchyard.
The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inculsive. Roman History, from the commencement of the Second Punic War to the Death of Augustus.

Canada Law Journal.

VOL. XVIII. JULY 1, 1882. No. 13.

DIARY FOR JULY.

1. Sat... Long vacation begins. Dominion Day. Confederation, 1867.
2. Sun... *4th Sunday after Trinity.*
3. Mon.. Co. Ct. Term (except York) begins. Heir and Dev. sitt. begin.
5. Wed.. Last day for service of notice of appeal from Ct. of Rev. to County Judge.
7. Fri.... Gen. Simcoe, first Lieut.-Gov. of U. C., 1792.
8. Sat... Co. Ct. Term (except York) ends. Cyprus ceded to England, 1878.
9. Sun... *5th Sunday after Trinity.*
11. Tue . Canada invaded by U. S., 1813.
14. Fri.... W. P. Howland first Lieut.-Gov. of Ontario. 1808.
15. Sat .. Manitoba entered Confederation, 1870.
16. Sun .. *6th Sunday after Trinity.*
17. Tue . Heir and Devisee sittings end.
20. Thurs. British Columbia entered Confederation, 1871.
22. Sun... *7th Sunday after Trinity.* Union of Upper and Lower Canada, 1840.
24. Mon.. Canada discovered by Cartier, 1534.
25. Tue . Battle of Lundy's Lane, 1813.
26. Wed.. Jews first admitted to House of Commons, 1858. Dr. Robitaille, Leiut.-Gov. of Quebec, 1879.
29. Sat.... First Atlantic Telegraph laid, 1866.
30. Sun... *8th Sunday after Trinity.* Government of U. C. removed from Niagara to York, 1793.

TORONTO, JULY 1, 1882.

IN accordance with our custom we shall be merciful to our readers during the long vacation, and only issue one number in July, and one number in August, namely, on the first of each month. After August our bi-monthly issue will be resumed.

JOHN CHARLES DAY, Q.C., has been elevated to the Bench, and takes the place of Sir Charles Bowen as a Judge of the Queen's Bench Division of the High Court of Justice. He was called to the Bar at the Middle Temple in 1849, and has the reputation of being a sound and practical lawyer. As *Punch* says: "The next thing will be to turn Day into Knight, and we trust it will be a long time before the break of Day."

WE conclude the discussion on the *Thrasher Case*, which has excited so much interest in British Columbia, by a second letter from Mr. Alpheus Todd. This case, which involves a very important constitutional question, will, probably, come before the Supreme Court at an early day. Much learning on the subject will be found in the correspondence and in the articles published in this Journal, which will be of great interest to all concerned in this important branch of the law.

THE following order has been issued by the Supreme Court, dated June 27, 1882: "Every County Court clerk shall keep his office open for the transaction of business, on every day, except on holidays, and (except as hereinafter provided) from 10 a.m. to 3 p.m. on and between July 1 and Sept. 1; and on and between Dec. 24 and Jan. 6 every such clerk shall keep his office open for the transaction of business from 10 a.m. until noon, and during the statutory sittings of the Court such clerk shall keep the office open, as aforesaid, on and between the said dates until 4 p.m."

A letter reaches us just before going to press, signed "Law Student," in answer to the one by "Professional," on the subject of scholarships in our last number. The letter is too long to print in full in our crowded space. The chief point the writer makes is, we think, a good one, namely, that the men who get the scholarships are the men who would be first, whether there were scholarships or not. But the giving of prizes and scholarships as a recognition of merit in examinations is so universal a practice that there is really very little use in discussing the

advantages or disadvantages of it. Stern moralists may no doubt find something in it not quite in accordance with the eternal fitness of things. But *palmam qui meruit, ferat*, is a sentiment which combines justice with generosity, and the grand old Homeric maxim, "Strive always to be first in excellence and to surpass all others," is not a bad one for the young men of this, or any other country, to adopt.

THE employees of the post office who lately objected to having a colored man as one of their fellow servants, may find some gratification, perhaps, in the thought that our enlightened brethren to the south of us are apparently of very much the same way of thinking. One of the circuit courts of Ohio, at all events, had recently occasion to decide, in the case of *Gray* v. *Cincinnati Southern Ry. Co.*, 11 Fed. Rep. 683, in the words of the head-note, that "A colored lady who had purchased and held a first-class ticket, was entitled to admission into the ladies' car, if there was room for her therein; and, if she was refused admission and the railroad company declined to carry her except in the smoking car, containing only men, some of whom were smoking, she had a right to decline such accommodation, and it is liable to her in damages." What makes the matter worse is that the poor woman in this case had a sick child in her arms at the time she was refused admittance into the ladies' carriage, but it is only just to the fair members of the gentler sex to add that they apparently had nothing to do with her exclusion. At all events, it was to the credit of the jury that they brought in a verdict of $1000 damages against the Company.

WE have received the first four numbers of a new legal contemporary, the *American Law Magazine*, published at Chicago. It professes to report, in monthly issues, all recent decisions of any importance in all the State, Supreme and Federal, Courts, either in full or in carefully prepared abstracts. It certainly gives its readers a great number of decisions of a great number of Courts. Everything, however, depends on the care with which the cases are collected, and the competency of the editors to select from the great mass of material before them those decisions which are of permanent value. How far these requisites exist in the present case time alone can show. If, however, the scheme is carried out with ability, the *Magazine* ought to have many subscribers, as it embraces within its scope the combined objects of the *Federal Reporter* and *American Reports*, while the subscription price is very moderate. We notice, moreover, that the editors, in their advertisement, offer to supply subscribers with the full decision in any case where they only publish abstracts, for the mere cost of copying. We confess, however, to having been slightly prejudiced against the publication by the space given to what is called "Non-Essentials." This department appears to be a tribute to that curious side of American genius, which appears to find a strange delight in the wholesale consumption of anecdotes, neither very brilliant nor very refined.

A CORRESPONDENT, a law student, does us the honour to ask our opinion of the conduct of a certain County Court Judge, who presides over a Court held not a hundred miles from London, Ont. It appears, according to our correspondent, that upon a petition presented by a gentlemen, who has has some office in connection with the Court, but is not himself a member of the bar, and without consulting the convenience of the bar, jury, suitors or witnesses, His Honour saw fit to adjourn his Court over a day fixed for the "Queen's Plate" at some local races. No doubt, if our correspondent's letter is an exact account of what actually occurred, there

would appear to have been some lack of that courtesy and consideration which usually mark the relations of Bench and Bar, and which are illustrated by Serjeant Ballantine's account, in his "Recollections," of the opening of an Assize Court in England:—

The leaders have taken their seats, exchanged bows with the Judges, nodded to each other, and the stereotyped dialogue ensues between the Judge and the leader: "On what day, Mr. ——, will it be convenient to take special juries?" "The bar is at your Lorship's disposal." "What do you say to Thursday?" "It will suit admirably." "Thursday be it then. Mr. Sheriff, let the special juries be summoned for Thursday next."

But after all the arrangement of business is a matter in the discretion of the Court, and if His Honour acted on the occasion complained of, as he said he did, from a desire to "do honour to Her Majesty," we can only say his intention was good, though the execution of it appears to have been faulty. At all events, there is no appeal allowed in these cases—not even to the CANADA LAW JOURNAL; and the only consolation we can tender to our correspondent is the fact that when he himself is called to the Bar (not "Barr," by the way), he will be able to see to it that the Judges are not left without information as to what appears to him to be consonant to the convenience of the profession and the proper administration of justice.

RECENT ENGLISH DECISIONS.

Of the April numbers of the *Law Reports* there still remains for review 19 Ch. D. pp. 519–649; while the June numbers, which have now arrived, consist of the table of cases and index to 19 Ch. D., together with 20 Ch. D. pp. 1–229; 8 Q. B. D. pp. 585–712; and 7 P. D. pp. 61-102.

WILLS—UNCERTAINTY.

In 19 Ch. D. pp. 519-649, the first case, *in re Roberts*, was one in which the construction of a will containing a gift to descendants bearing a particular name was involved. The decision of the Court of Appeal was that in the case of this will the limitations to descendants was a gift for life to descendants living at the determination of the life interests, and bearing the name in question, as joint tenants, and that the limitations after the life interests were not void for uncertainty or for remoteness. But the only point in the case which it appears necessary to specially notice here is the *dictum* of Jessel, M.R., that—"The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

The next case, *Curtius* v. *Caledonian Ins. Co.*, has already been noticed, *supra* p. 172, as reported 51 L. J., N. S. 80.

FORECLOSURE ACTION—STATUTE OF LIMITATIONS.

The next case, *Harlock* v. *Ashberry*, p. 539, was an appeal from the decision of Fry, J., reported 18 Ch. D., 129, and noted *supra* p. 7. It will be remembered that in this case the tenant of certain mortgaged premises paid the mortgagees half a year's rent, in consequence of a notice from them that they claimed the estate, and Fry, J., held that this payment by the tenant was sufficient to bar the Statute of Limitations under Imp. 1 Vict. c. 28 (R. S. O. c. 208, sec. 22). The grounds of their judgment are clearly put in the words of Brett, L.J. "The question arises whether payment of rent by a tenant to a mortgagee, who has exercised the right to demand the rent, is a payment of principal or interest within that section. I come to the conclusion that it is not, for three reasons: (i.) It is, at the present stage, no payment at all as between mortgagor and mortgagees—it is only an item in an account which will have to be settled between the mortgagor and mortgagee —an item in an account which is to go to the

credit of one party to that account, that account containing many items more on the same side besides principal and interest and costs—*e.g.* expenses, repairs, etc. That cannot be called payment either of principal or interest at all. (ii.) It is not a payment within the section because it is not, as made, a payment of principal or interest—it is a payment of rent—rent paid by the person making the payment, and rent received by the person receiving the payment. It seems to me that payment made as of rent and received as of rent cannot be said to be a payment of principal or interest. (iii.) But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans*, 11 H. L. C. 115." And all the Judges expressed the same view that in all Statutes of Limitation the principle on which they are founded is, that in those cases in which a payment is allowed to take the case out of the operations of the Statute of Limitations, it must be such a payment as amounts to an acknowledgment of liability; or, in the words of Jessel, M.R., "The underlying principle of all the Statutes of Limitation is, that a payment to take a case out of the statute must be a payment by a person liable, as an acknowledgment of right." Hence it will be seen that the Court of Appeal agrees with that part of the judgment of Fry, J., in the Court below, in which he says—"I think a payment will keep the right alive if it be made by the mortgagor or by any agent of the mortgagor," but dissents from that part of his judgment in which he goes on to add, "or by any person who, as between the mortgagor and mortgagee, is liable to make any payment to the mortgagee in satisfaction of the mortgage debt."

ADMINISTRATION ACTION—COSTS.

Of the next case, *Re Middleton, Thompson* v. *Harris*, p. 552, it is only necessary to say that the Court of Appeal asserted and acted on the principle that it is only just that the costs of administration, so far as they have been increased by the administration of real estate, should be borne by that real estate; and also to notice the *dictum* of Jessel, M.R., that in such an administration action, if the estate should prove insufficient, the plaintiff, unless he be executor, does not necessarily get his costs in priority to the defendants.

PURCHASE BY RAILWAY—AFFIDAVIT.

So also of the next case, *Errington* v. *Metropolitan District Railway*, p. 559, it appears only necessary to notice so much of the judgment of the Court of Appeal as lays it down, on the previous authorities, that in the case of the purchase of lands by Railway Companies under the powers in their acts, it is the Company who are to be the judges of what they require unless they are not acting *bona fide*, and the evidence, and the only evidence required, is the opinion of the surveyor or engineer or other officer of the company, unless the other side can shew that they are not acting *bona fide*. To which the M.R. adds: "Now, of course, you can shew want of *bona fides* in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may shew it by proving that the alleged purpose is so absurd, under the circumstances, that it cannot possibly be *bona fide*." It may also be added that in this case, which came up on motion for judgment, the M. R. declared a certain affidavit inadmissible, on the ground that "an affidavit made upon information and belief must state the source of information; a mere statement of belief will not do."

Recent English Decisions.

GIFT BY INFANT—UNDUE INFLUENCE.

The next case requiring notice, *Taylor* v. *Johnstone*, p. 603, is of an interesting nature. It was an action by the legal personal representative of a female infant, brought for the purpose of setting aside certain gifts made by the infant shortly before her death at the age of twenty years and three months, to a man and his wife, whom the infant's father had shortly before his own death, which occurred only a few months before his daughter's, requested to take charge of her and live in her house, and with whom the infant had deliberately chosen to go and live. Evidence was given to show that the infant in question was of firm will and business habits, and under these circumstances Bacon, V. C., refused to set the gifts aside. After making some remarks on the general law of infants, which, he observes, may be in some respects anomolous, but "must be said to be settled with all its faults,"—the V. C. says: "An infant may contract a marriage, and the legal impediment by which the infant is prevented from executing a settlement of his or her property is removed by statute; but I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession. There is, indeed, a special law, the creation of Courts of Equity in this country, and the same law with somewhat wider scope prevails in other European systems of jurisprudence, by which persons who stand in what is called a fiduciary relation to infants are precluded from obtaining, or at least from retaining, donations or benefits of any kind from their actual or *quondam* wards." But he held that in this case no such fiduciary relation—no relationship of guardian and ward—was proved to exist between the donee and the donor. It may be added that the cases on this branch of the law are collected in the notes to *Mitchell* v. *Humfray*, L. R. 8 Q. B. D. 587, in the June number of the American Law Register (21 Am. L. Reg. N. S. 371).

WILLS ACT—R. S. O., C. 106, SEC. 35.

In the next case, *re Hensler*, p. 612, a father by his will devised certain real estate to his son, who predeceased him, leaving issue, but before his death made a will leaving all his real estate to his father, and the question was whether the legal fiction created by the above section of the Wills Act, by which the devise of a father to a son predeceasing him, leaving issue, is to take effect as if the death of such son had happened immediately after the death of the testator, was to be extended so far as to hold the devise by the son to the father, in this case, a valid devise. Hall, V. C., held against this view, and declared the son to have died intestate as to his property. He says: "It seems to me that the object and purpose of the section was to effectuate the will of the father, and that that object and purpose are satisfied by holding that the son took the estate. Effect would have been given to the will of the son in case he had left property to some other than his father and who in fact survived him, yet as he left it to his father the gift by the son fails, for I cannot hold that the section ought to be extended to any case beyond the one expressly provided for."

PRINCIPAL AND SURETY—TRANSFER OF SECURITIES.

The next case, *Forbes* v. *Jackson*, p. 615, illustrates the rights of a surety to a transfer of securities, on payment of his principal's debt. There was in this case, a mortgage of leaseholds for £200, and the assignment of a policy on the life of the mortgagor as collateral security. The plaintiff, as surety for the mortgagor, covenanted with the mortgagee that while the £200 remained owing, he would pay interest on that amount at 5 per cent, and also pay the premiums on the policy. Subsequently, without the knowledge of the plaintiff the mortgagee made further advances to the mortgagor on the security of the same premises. The plaintiff, then, having paid all arrears of interest, and also the premiums on the policy, gave notice of his

intention to pay off the £200, and requested the mortgagees to transfer to him all the securities comprised in the mortgage, including the leasehold premises. The latter, however, refused to do so, unless the plaintiff also paid off the subsequent advances and arrears of interest, and relied on *Williams* v. *Owen*, 13 Sim., 597. Hall, V.C., however, gave judgment in favour of the plaintiff, on the general principle laid down in *Mayhew* v. *Crickett*, 2 Sw. 185, the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship:—"Nor does it matter in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt, they have nothing to do with the surety;" and he declared the decision in *Williams* v. *Owen* is not the law now. The V.C. goes further, and expresses an opinion that it is now settled that where additional security is taken by the creditor after the original security was given, and the contract of suretyship entered into, the right of the surety as regards the secutities given to the principal creditor extends also to the additional securities; and he discusses this question at some length.

POWER OF SALE—DURATION.

In the next case, *re Cotton's trustees*, p. 624, the principle of Fry, J.'s judgment is very clearly given in the head-note as follows:—"A power, given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be exercised, providing that the power in its creation was not obnoxious to the rule against perpetuities, and that the *cestuis que trustent* have not put an end to the trusts by electing to take the property as it stands. The learned judge observes at starting, that there is the greatest possible distinction between the determination of a power under the instrument which created it, and its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power. The former appears to me, subject to the question of the power going beyond the period allowed by law for the duration of such powers, to be a mere question of the intention of the donor of the power." Reference is made in this case to *Peters* v. *Lewes and East Grimstead Ry.*, L.R. 18 Ch. D. 429, noted *supra*, p. 69-70, in which it may be remembered the M. R. discusses the question of the duration of powers of sale.

MORTGAGES CONSOLIDATION.

The next case, *Harter* v. *Coleman*, p. 630, was also a decision of Fry, J., who himself thus concisely states the point in question in his judgment:—"A mortgagor mortgages Whiteacre to A., and he mortgages Blackacre to B. He then conveys the equity of redemption in Whiteacre to C., and subsequently A. and B. both assign their first mortgages to D., or which would come to the same thing, B. transfers his mortgage to A. Can D. in the one case, or can A. in the other, consolidate the mortgages as against C., the assignee of the equity of redemption of one of the two mortgaged properties?" He answers this in the negative, discussing the question first on priniciple and then with reference to authorities. "The principle," he says, "upon which the Court has proceeded with reference to the consolidation of mortgages I take to be this, that the mortgagor or his assignee who asks for the assistance or mercy of the Court, on the ground of his equity, must himself do equity, and the question is, what equity must he do?" And he comes to the conclusion that, as in the case of the assignment of *choses in action*—the assignee of a *chose in action* takes it subject to all equities subsisting at the time of the assignment, and not to equities that arise subsequently and which did not exist at that

time so, likewise, the Courts have laid down the principle, that the equities to be performed by the assignee of an equity of redemption are those to which his assignor was liable at the date of the assignment, and the equity to consolidate, arising from a subsequent union in the same person of the mortgage, of which the equity of redemption has been assigned to him, with another, is not an equity which was then subsisting, and therefore it is not one of the equities subject to which the equity of redemption was purchased. Turning to the authorities, he shews that there are two decisions of Courts of jurisdiction co-ordinate with his, antagonistic to each other, viz., *White* v. *Hillacre*, 3 Y. & C. Ex. 597, which supports his own view, and *Beevor* v. *Luck*, L. R. 4 Eq. 537, which is opposed to it; and as though the Court of Appeal had treated *Beevor* v. *Luck* as good law, the House of Lords had expressed the gravest doubts as to the propriety of that decision, he declares himself at liberty to choose between them, and says:—"I have no hesitation in saying that the decision in *White* v. *Hillacre* is, in my opinion, consonant with the only principles upon which the Court can proceed, and that the decision in *Beevor* v. *Luck* is not consonant with those principles."

This appears the last case requiring special notice in the number under review, which completes Vol. 19 of the Chancery Division. Among the June numbers of the Law Reports is the index and table of cases.*

A. H. F. L.

* An article on *London and County Bank* v. *Groom*, L. L. 8 Q. B. D. 288, noted *supra* p. 153, and relating to overdue cheques, is contained in 16 Ir. L. T. 202, where it is reprinted from the *English Law Journal*. The writer comes to the conclusion that the decision of Field, J., in that case, is "sound in policy as well as law, and in accordance with the ideas of the day, which lean greatly in favour of freedom of negotiability."—EDS. C. L. J.

LAW SOCIETY.

EASTER TERM, 45th VICTORIA, 1882.

The following is the *resume* of the proceedings of the Benchers during Easter Term, published by authority:—

During this term the following gentlemen were called to the Bar, namely:—

George S. Lynch Staunton, with honours, awarded a silver medal; Arthur O'Heir, Thos. Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, Jno. Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely:—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thos. Ambrose Gorham, Christpher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

The following gentlemen passed their first Intermediate Examination, namely:—

D. C. Ross, John Greer, R. V. Sinclair and W. D. Gwynne, with honours; Robert Smith, J. A. Hutcheson, H. G. Mackenzie, G. C. Thompson, J. McPherson, W. C. Widdifield, J. Denovan, A. E. Overell, C. W. Lasby, J. V. Ryerson, John Geale, D. Macdonald, C. F. Farewell, W. H. Robinson, J. Heighington, F. E. Cockrane, T. E. Williams, A. G. Murray, T. J. F. Hilliard, N. H. Beemer, T. B. Bunting, John Tytler, A. K. Goodman, D. B. S. Crothers, L. M. Hays, Thos. Johnson, D. F. McMillan, A. B. Shaw, and H. Brock.

The following gentlemen passed their second Intermediate Examination, namely :—

J. Bicknell, P. D. Crerar, E. Sweet, and C. C. McCaul, with honours ; and J. A. C. Reynolds, L. C. Smith, W. B. Dickson, R. W. Armstrong, R. P. Echlin, E. J. Hearn, S. F. Washington, C. Henderson, C. G. Jarvis, T. A. Elliott, T. Parker, W. J. Wright, A. E. Barber, J. Campbell, F. A. Munson, F. J. Dunbar, R. McLean, George Smith, W. J. Code, C. H. Ivey, J. W. Hanna, E. R. Reynolds, W. Masson, and R. N. Ball.

The following gentlemen passed the Preliminary Examination as students and articled clerks, namely :—

Graduates—Archibald Gilchrist Campbell Alexander, W. A. Finlay, James Redmond O'Reilly. Matriculants of Universities--James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold William Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alex. James McKenzie, Phillip Henry Allin, Herbert James Dawson, Angus William Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner James Arnold, James Herbert Kew, Ralph Herbert Dignan, William John McDonald, Shirley B. Ball, Alfred William Lane, Orville Montrose Arnold, Horace Bruce Smith, James Archibald Macdonald, Theodore Augustus McGillivray, George Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis Redmond O'Reilly. Articled Clerks—Edward Considine, Donald Archibald Cameron.

Monday, May 15th.

Convocation met. Present—Messrs. Bethune, Crickmore, Britton, MacKelcan, Maclennan, Irving, Ferguson, Hoskin, Read, Kerr, Foy, Benson, L. W. Smith, J. F. Smith, McMichael.

In the absence of the treasurer Mr. Irving was elected chairman.

The minutes of the last meeting were read.

Mr. Ferguson presented the report of the Special Committee on the Call of English Barristers and the admission of English Solicitors in this Province, which was read and the consideration of it deferred.

The petition of Mr. W. R. Armstrong praying for re-examination by the Benchers, was refused.

The petition of Thomas Scholefield was referred to Legal Education Committee.

The Petition of E. Gus. Porter was refused.

The petition of Zebulon Landon was referred to Discipline Committee.

The resignation by Mr. Galt of the office of reporter to the Chancery Division was accepted to take effect on the last day of the present term.

Ordered that the secretary do advertise for applications for the vacant reportership, and that a call of the Bench be made for Friday, 26th inst., to make the appointment.

The report of the Finance Committee was presented, read, and ordered to be considered on 16th instant.

Tuesday, May 16th.

Present Messrs Read, Mackelcan, Hoskin, Martin, Maclennan, Irving, Crickmore, Benson, Britton, J. F. Smith, Fraser, McCarthy, Robertson, L. W. Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman. The minutes of the last meeting were read.

The report of the special committee on Honors and Scholarships was received and read as follows :

EASTER TERM, 1882.

To the Benchers of the Law Society in Convocation,

The committee to whom was referred the question of who are entitled to Honors and Scholarships in reference to the Call and Intermediate Examinations, beg leave to report.

That of the two gentlemen who competed for Honors on the examination for Call, George S. Lynch Staunton alone passed with Honors, and he would have been entitled to a Gold Medal had he passed both his Intermediates with Honors, but his Second Intermediate passed in Hilary Term, 1881, not being passed without an oral, he is entitled to a Silver Medal only.

The following gentlemen passed their First Intermediate Examination with Honors, namely: D. C. Ross, John Greer, R. V. Sinclair and W. D. Gwynne, and of them D. C. Ross is entitled to $100, John Greer to $60, R. V. Sinclair to $40, and W. D. Gwynne to a Diploma.

The following gentlemen passed their Second Intermediate Examination with Honors, namely: J. Bicknell, P. D. Crerar, E. Sweet and C. C. McCaul, of whom J. Bicknell is entitled to $100,

P. D. Crerar to $60, E. Sweet to $40, and C. C. McCaul to a Diploma.

JOHN CRICKMORE,
Chairman.

The report was adopted.

Ordered, that in future on the first day of every term six copies of the printed and written questions submitted by the examiners at all examinations held since the preceding term be laid before Convocation, the questions submitted to each of the different classes to be grouped and fastened together.

The petition of John B. Hands was refused.

May 20, 1882.

Present—the Treasurer and Messrs Crickmore, J. F. Smith, Murray, Foy, Glass, Maclennan, Irving, Bethune, Dr. Smith, Hoskin, Read.

The minutes of the last meeting were read.

The report of the Finance Committee was considered, and with some ammendments was adopted.

Mr. Irving presented the report of the Library Committee, recommending that the salary of Mr. Williams, the junior assistant be increased to $600 per annum.

The report was adopted, and it was ordered that Mr. Williams' salary be increased to $600 a year to commence on the 1st April 1882.

The Hon. Edward Blake was elected Treasurer for the ensuing year.

The following Standing Committees were appointed for the ensuing year, namely:

Journals of Convocation.—The Hon. C. F. Frazer, Messrs Hoskin, Foy, Kerr, Moss, Maclennan, McCarthy, Hon. T. B. Pardee, B. M. Britton.

Legal Education.—Messrs Benson, Crickmore, Ferguson, Moss, Hoskin, Smith, MacKelcan, Lemon, Hon. T. B. Pardee.

Finance.—Messrs Foy, Crickmore, Martin, S. H. Blake, L. W. Smith, Murray, Meredith Hon. A. S. Hardy and D. B. Read.

Reporting.—Messrs Bethune, Britton, Cameron, MacKelcan, McCarthy, Martin, J. F. Smith, Maclennan, Glass.

Discipline.—Messrs Benson, Hoskin, Maclennan, Beaty, Kerr, Robertson, Glass, Martin, McMichael.

Library.—Messrs Bethune, Cameron, Beaty, Irving, McMichael, Ferguson, Moss, S. H. Blake, Bell.

County Library Aid—Messrs Benson, Cameron, Glass, Meredith, Kerr, Robertson, Britton, Hardy, Martin.

Mr. Crickmore was appointed representative of the Law Society in the Senate of the University of Toronto to the end of Easter Term 1883.

Mr. Murray gave notice that he would on the 26th instant bring up the subject of the telegraph and telephone office.

Friday, May 26.

Present—the Treasurer and Messrs Read, Crickmore, Benson, Foy, Hoskin, Murray, Bethune, Britton, MacKelcan, J. F. Smith, Maclennan, Ferguson, Martin, Kerr, Irving, Crooks, Beaty.

The minutes of the last meeting were read and approved.

The Legal Education Committee reported in the case of C. E. Irvine who passed his examination in Michaelmas Term, 1881, recommending that he receive his Certificfite of Fitness. Ordered accordingly.

The same committee reported on the Second Intermediate Examination of Mr. W. A. McLean which was passed in Hilary, 1882. Ordered that this examination be allowed.

The Committee on Reporting presented the names and applications of the candidates for the vacant reportership in the High Court.

The same Committee recommended that the Society subscribe in the future for 1,200 volumes of Supreme Court Reports, instead of 1,350. Ordered accordingly.

Mr. MacKelcan from the Special Committee appointed on the subject of short-hand writers' notes presented the following report:

TORONTO, 26th May, 1882.

The committee appointed last term to wait upon the Ontario Government with the view of securing a reduction in the fees charged for shorthand notes at the trial and hearing of causes, beg to report that they addressed a memorandum to the Attorney-General of Ontario, a copy of which is appended hereto, and that in answer to such memorandum the Government have reduced the cost of shorthand writer's notes as set forth in the communication of the Attorney-General hereto annexed.

F. MACKELCAN,
Chairman.

(Copy of memorandum).

TORONTO, 1st March, 1882.

The committee appointed by the Law Society to wait upon the Ontario Government with the view of securing a reduction of the fees charged ed for shorthand writers' notes at the trial and hearing of causes, beg to submit the following memorandum:--

No motion can now be made against the decision of a judge or to set aside the verdict of a jury until copies are furnished to the Judges of the Divisional Court of the evidence taken by the shorthand writer at the trial. The copies of the judges are charged for at nine cents per folio, three being supplied for that sum, and these must be paid for by the party who moves against the verdict or judgment. In some cases the judge will enter a *pro forma* judgment or decision, leaving the real determination of the questions at issue to the full Court, and in such cases it is putting the party who has to move under a very heavy penalty when he is compelled to pay a large sum for the notes of evidence before he can be heard by the Court. The same may be said of cases where there has been a manifest miscarriage of justice, rendering an application to the full Court necessary. The Committee are of opinion that all necessary copies of the evidence should be furnished to the judges without charge, and that a charge of five cents per folio would be ample for each copy furnished to the parties; with the improved type writers 210 folios can be copied in an ordinary working day, from five to ten copies being made at once, but assuming that 100 folios only would be copied five cents a folio for the copy required by each party would amount to $10 per day for the reporter's services while making the copies, which is more than his charge per day when taking evidence.

It is not to be expected that those who are obliged to go to the Divisional Court should contribute towards the cost of the taking of evidence in cases where the questions in dispute are finally disposed of at the trial, and it should be quite enough to ask them to pay for the copies of evidence they are obliged to obtain for their own use upon the argument before the Divisional Court.

There may be cases in which one copy only of the evidence will be required. In such cases five cents per folio will fully pay the cost of the copy, and in most cases two or more copies will be needed by the parties, yielding a good profit upon the work done.

Under the present regulations the five copies which are all made at once are charged for at the aggregate rate of nineteen cents per folio, namely, nine cents for the copies for the judges and ten cents for the copies for the parties, additional copies can be struck off at the same time and when required, are supplied at five cents per folio each.

A shorthand writer, with a good type-writer, copying 210 folios in ten hours, as can be done, is able, under the regulations now in force, to earn $40 a day, and in cases where more than two copies of evidence are required by the parties, may earn still more.

The Committee think that it is essential to the fair administration of justice that a change should be made in the mode of charging for copies of shorthand writers' notes, and that suitors should not be compelled to pay for the copies required by the judges, and they would respectfully request that the matter should be taken into consideration with a view to adopting some such change in the regulations as is herein suggested.

For the Committee,

F. MACKELCAN,
Chairman.

TORONTO, 26th May, 1882.

SIR,—Referring to yours of the 9th inst., with reference to the reduction of the short-hand reporters' fees, I beg to say that after consultation with the Judges an order in Council has been passed fixing these fees as follows: For copies required for the Judges under rules made or to be made in that behalf, and to be furnished at the expense of the parties, and for one copy for the party desiring to move thereon, ten cents per folio for the copies required, not exceeding four altogether; for any additional copies made for the parties, at the rate of five cents per folio, for each copy.

The Attorney General trusts these fees will be satisfactory to the Law Society.

Your obedient servant,

J. G. SCOTT,
Deputy Atty. Gen.

F. MACKELCAN, ESQ., Q.C.,

Mr. Lefroy was elected reporter of the High Court.

Mr. Maclennan, from the Committee on Reporting, presented the following statement :—

The Committee have to report that the work of reporting is in a fairly satisfactory state, the cases in the Queen's Bench and Common Pleas Divisions being, as usual, completely cleared off, and the other cases being well up so far as the present reporters are concerned. The Committee regret that Mr. Tupper has not yet completed the work which was unfinished in his hands when he resigned the office; he has, however, given strong assurances that the work will be completed at an early day.

All which is respectfully submitted.

J. MACLENNAN,
Chairman.

On motion of Mr. Murray it was ordered that the question of the management and tariff for the telephone office be referred to the Finance Committee, to report at next meeting of Convocation.

Mr. Martin gave notice for Saturday, June 3rd, of the following notice of motion, namely:

That in the opinion of Convocation the Courts at Osgoode Hall should be used exclusively for the argument of cases. That no trials of causes involving the examination of witnesses should take place within the building.

Resolved—That a Committee be appointed to call upon the Judges and the Attorney-General for the purpose of representing the necessity of arrangements being made as early as practicable which will remove the inconveniences which have prevailed under the the present system and which are constantly increasing.

Saturday, June 3rd.

Present—Messrs. Maclennan, Irving, Foy, Martin, Murray, Hoskin, Crickmore, Read and J. F. Smith.

In the absence of the Treasurer, Mr. Read was appointed Chairman.

The minutes of last meeting were read and approved.

The report of the Finance Committee on the question of the fitting of the old Convocation Room, and on the question of the telephone office, was received.

Ordered that the first clause of the report, relative to the fitting up of the old Convocation Room, be considered at the meeting of Convocation on the 27th June.

Ordered that the second clause of the report, relative to the telephone office, be read as follows:

The Committee beg to report on the question of the telephone office, that they are of the opinion that the rate of two cents a message fixed last term is a proper charge, and that the operator be instructed to continue same till the end of the financial year, and collect the amounts from the various persons using the telephone, and that she be also instructed to collect the amount due for the past three months at that rate, and that persons refusing to comply with these terms be not allowed to use the telephones; and that the operator and boy be continued at the same salary as at present.

On motion of Mr. Murray this clause of the report was adopted.

The report of the Committee on Discipline that a *prima facie* case had been made out in the matter of Zebulon Landon, was received, read and adopted.

On motion of Mr. Murray it was ordered that the charges set out in the petition of Mr. Landon be referred to the Discipline Committee for investigation.

The report of the Committee on Legal Education on the Law School, was read as follows:

REPORT ON LAW SCHOOL.

The Committee on Legal Education beg leave to report as follows, on the subject of the Law School:

1st.—That the lecturers have furnished returns showing the subjects lectured upon during the past season, the number of lectures delivered to each class, and the attendance at each lecture.

2nd.—From these returns it appears that Mr. Hodgins delivered seven lectures to the Senior Class on the subject of "Constitutional Law," at which the average attendance was thirty-four.

That he delivered eight lectures to the Junior Class on "Criminal Law," at which the average attendance was fifteen.

That Mr. Macdougall delivered eight lectures to the Senior Class on the subject of "Negligence," at which the average attendance was twenty-two, and seven lectures to the Junior Class on "Bills and Promissory Notes," at which the average attendance was twelve.

That Mr. Delamere delivered eight lectures to the Senior Class on "Partnership," the average attendance at which was sixteen, and eight

lectures to the Junior Class on the subject of "Practice under the Ontario Judicature Act," at which the average attendance was forty-six.

That Mr. Armour delivered eight lectures to the Senior Class on the "History and Growth of Real Property Law," that he kept a record of the attendance at four only of these lectures, which record shows an average of twenty-two at each lecture; that he delivered eight lectures to the Junior Class on the subject of "Married Womens' Property Rights," at which the average attendance was eleven.

From this it appears that in all thirty-one lectures were delivered to the Senior Class, at which the average attendance was twenty-four; and that thirty-one lectures in all were delivered to the Junior Class, at which the average attendance was twenty-one.

The Committee beg to submit to Convocation with this report the returns of the varions lecturers. The attendance has been very irregular and unsatisfactory as to numbers considering the very numerous signatures to the petition for re-establishing the Law School, it is very disappointing to find so few students availing themselves of the lectures. Taking the average attendance on both lectures the numbers are reported as forty-five, but, in fact, as very many of the same gentlemen attend, as well the senior as the junior lectures, it is not probable that more than thirty-five gentlemen in all attended the lectures; this would show that the cost of the course for each gentleman is about twenty-three dollars. The Committee, however, agree in recommending that it is desirable to continue the experiment of the Law School for the period of two years, as already determined upon by Convocation.

JOHN CRICKMORE,
Chairman.

The Report of the Special Committee on the call of English Barristers and the admission of English Solicitors was received and read as follows:—

The Report of the Special Committee to whom it was referred by resolution of Convocation, passed during Hilary Term last, to consider the best means of carrying out certain changes in the existing rules of the Society for the Call of Barristers and Admission of Solicitors in special cases.

1st. That in the opinion of this Committee Convocation has power without the aid of further legislation to make the changes contemplated by the resolution.

2nd. That this Committee recommend that the said changes be carried out by amending rules 94 and 97 in accordance with the said resolution of Convocation, but it appearing that solicitors of the Supreme Court of Ontario may, upon certain conditions, be admitted to practice as solicitors of the Supreme Court of Judicature in England, this Committee recommend that Convocation enact a rule providing for the admission of solicitors of the Supreme Court of Judicature in England as solicitors of the Supreme Court of Ontario upon as nearly as possible the same terms and conditions as solicitors of our Courts are now admitted in England.

J. H. FERGUSON,
June 3rd, 1882. Chairman.

Ordered that the report be considered forthwith.

On the motion of Mr. J. F. Smith it was ordered that the recommendation contained in the report be adopted.

On the motion of the Chairman of the Legal Education Committee it was ordered that Mr. Rordans be paid a sum not exceeding $30 for the publication of the Curriculum in the New Law List.

Ordered that Mr. Martin's motion on the subject of the use of Osgoode Hall for the trial of causes do stand over to be considered on June 27th.

Mr. Ferguson gave notice of the first reading of the new rule respecting the Call of English Barristers and the admission of English Solicitors for 27th June instant.

Convocation adjourned.

CRIMINAL STATISTICS.

An appendix to the Report of the Minister of Agriculture gives the criminal statistics for the year 1880. It is very neatly and intelliigbly got up and contains a great deal of information on the statistics of crime of all kinds, where committed, number of persons charged, with full particulars of the events which took place, and the dealings of justice with the criminals. It will doubtless be interesting and useful to many though it cannot be said to be very lively read, ing or particularly interesting to a general student. The work must have been very laborious, and the compiler has shown much intelligence in the way he has collected and arranged his material.

REPORTS

RECENT ENGLISH PRACTICE CASES.

BURRARD v. CALISHER.

Imp. Jud. Act, 1873, sect. 56—Ont. Jud. Act. sect. 47—Motion to vary report of official referee.

CHITTY, J.—In my opinion—and I wish to lay down this as the rule of practice I purpose to adopt in my Court where, in an action which has by the judgment been referred to the official referee, and in which the further consideration has been adjourned, either party to the action desires to vary the report, he should serve the opposite party with a notice of motion to vary. This notice of motion should be given for the usual motion-day in this branch of the Court; but when the motion is mentioned it will be ordered to be adjourned, as a matter of course, to come on with the further consideration. Where the further consideration has not been adjourned, then the practice which was laid down by the Master of the Rolls should be adopted; that is to say, the requisite notice should be given either by motion or summons to vary.

[NOTE.—*The Imperial and Ontario sections are nearly, but not quite, identical. Another matter arising in this case is noted* supra *p. 180.*]

ABBOTT v. ANDREWS.

Imp. O. 55, r. 1; Ont. rule 428—Costs—Jury trial—Nonsuit on some issues—Procedure when judgment ambiguous as to costs.

When in an action tried by a jury, the plaintiff succeeds upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled, under the above rule, to the costs of the issues upon which the plaintiff is nonsuited.

When a judgment is ambiguous as to costs, the proper course is, not to appeal from the Master's order refusing to tax the costs of one of the parties, but to apply to the Judge who tried the case to correct any ambiguity in the judgment.

LORD COLERIDGE, C. J., and GROVE, J.

April 25.—L. R. 8 Q. B. D. 648.

NOTE.—*The Imp. and Ont. rules are identical.*]

LUMSDEN v. WHITE.

Imp. O. 29, r. 12; O. 40, r. 11—Ont. Rules 176, 322.

Final judgment on defence and counter-claim.

Where plaintiff makes default in delivery of reply to the defendant's statement of defence and counter-claim, the latter may obtain an order for final judgment in respect of both claim and counter-claim, under rule 322.

April 28—L.R. 8 Q.B.D. 650.

Action for unliquidated damages for breach of contract and statement of claim accordingly. The statement of defence denied the allegations of the statement of claim and counter-claimed for money lent by the defendant to the plaintiff. The plaintiff having made default in delivery of reply, the defendant moved for judgment against the plaintiff on the claim and counter-claim.

GROVE, J.—The provisions of the rules with regard to counter claims are not very distinct so far as this point is concerned, but Imp. O. 19, r. 3, (Ont. Rule 127), which says that a counter-claim shall have the effect of a statement o claim in a cross action, seems to be applicable in this as in other cases. That being so, the counter-claim here is in the same position as if it had been a statement of claim. Then by Imp. O. 29, r. 12, (Ont. Rule 176), if no reply is delivered, the pleadings are to be deemed closed, and the statements of fact in the pleading last delivered are to be deemed to be admitted. It must be taken, therefore, in this case, that the statements of fact in the counter-claim are admitted. Then by Imp. O. 40, r. 11, (Ont. Rule 322), the defendant may move for any order to which he is entitled on admissions in the pleadings. I must admit I should have been inclined to think that this rule was not applicable to the present case but for the decisions on the subject. . . . It seems, however, that Courts of co-ordinate jurisdiction have held it to apply to final judgments, and by their decisions we are bound. So construing the rule the case seems, by virtue of the other rules to which I have referred, to be brought within it, and the defendant appears to be entitled to the counter-claim as well as the claim.

LOPES, J.—If there had been no decision on the subject, I should have been inclined to doubt whether Imp. O. 40, r. 11, (Ont. Rule 322), applied to final judgment or only to interlocutory measures of relief, but the decisions seem to go

lectures to the Junior Class on the subject of "Practice under the Ontario Judicature Act," at which the average attendance was forty-six.

That Mr. Armour delivered eight lectures to the Senior Class on the "History and Growth of Real Property Law," that he kept a record of the attendance at four only of these lectures, which record shows an average of twenty-two at each lecture; that he delivered eight lectures to the Junior Class on the subject of "Married Womens' Property Rights," at which the average attendance was eleven.

From this it appears that in all thirty-one lectures were delivered to the Senior Class, at which the average attendance was twenty-four; and that thirty-one lectures in all were delivered to the Junior Class, at which the average attendance was twenty-one.

The Committee beg to submit to Convocation with this report the returns of the varions lecturers. The attendance has been very irregular and unsatisfactory as to numbers considering the very numerous signatures to the petition for re-establishing the Law School, it is very disappointing to find so few students availing themselves of the lectures. Taking the average attendance on both lectures the numbers are reported as forty-five, but, in fact, as very many of the same gentlemen attend, as well the senior as the junior lectures, it is not probable that more than thirty-five gentlemen in all attended the lectures; this would show that the cost of the course for each gentleman is about twenty-three dollars. The Committee, however, agree in recommending that it is desirable to continue the experiment of the Law School for the period of two years, as already determined upon by Convocation.

JOHN CRICKMORE,
Chairman.

The Report of the Special Committee on the call of English Barristers and the admission of English Solicitors was received and read as follows:—

The Report of the Special Committee to whom it was referred by resolution of Convocation passed during Hilary Term last, to consider the best means of carrying out certain changes in the existing rules of the Society for the Call of Barristers and Admission of Solicitors in certain cases.

1st. That in the opinion of this Committee Convocation has power without the aid of legislation to make the changes contemplated by the resolution.

2nd. That this Committee recommend that the said changes be carried out by amending rules 94 and 97 in accordance with the said resolution of Convocation, but it appearing that solicitors of the Supreme Court of Ontario may, upon certain conditions, be admitted to practice as solicitors of the Supreme Court of Judicature in England, this Committee recommend that Convocation enact a rule providing for the admission of solicitors of the Supreme Court of Judicature in England as solicitors of the Supreme Court of Ontario upon as nearly as possible the same terms and conditions as solicitors of our Courts are now admitted in England.

J. H. FERGUSON,
Chairman.

June 3rd, 1882.

Ordered that the report be considered forthwith.

On the motion of Mr. J. F. Smith it was ordered that the recommendation contained in the report be adopted.

On the motion of the Chairman of the Legal Education Committee it was ordered that Mr. Rordans be paid a sum not exceeding $30 for the publication of the Curriculum in the New Law List.

Ordered that Mr. Martin's motion on the subject of the use of Osgoode Hall for the trial of causes do stand over to be considered on June 27th.

Mr. Ferguson gave notice of the first reading of the new rule respecting the Call of English Barristers and the admission of English Solicitors for 27th June instant.

Convocation adjourned.

CRIMINAL STATISTICS

An appendix to the Report of the Department of Agriculture gives the criminal statistics for the year 1880. It is very neatly and carefully prepared and contains a great deal of information. The statistics of crime of all kinds, number of persons committed, particulars of the events which led to the dealings of justice with them, will doubtless be interesting to many readers, though it cannot be said that they are exciting or particularly interesting reading at present. The work is well done, and the compilers, in the [illegible]

REPORTS

RECENT ENGLISH PRACTICE [illegible]

BURRARD v. CALISHER.

Imp. Jud. Act, 1873, sect. 56—Ont. [illegible] 47—Motion to vary report of [illegible]

CHITTY, J.—In my opinion—and I [illegible] down this as the rule of practice I [illegible] adopt in my Court where, in an action [illegible] the judgment been referred to the official [illegible] and in which the further consideration has been adjourned, either party to the action desiring to vary the report, he should serve the opposite party with a notice of motion to vary. The notice of motion should be given for the next motion-day in this branch of the Court; and when the motion is mentioned it will be ordered to be adjourned, as a matter of course, to come on with the further consideration. Where the further consideration has not been adjourned, then the practice which was laid down by the Master of the Rolls should be adopted; that is to say, the requisite notice should be given either by motion or summons to vary.

[NOTE.—*The Imperial and Ontario sections are nearly, but not quite, identical. Another matter arising in this case is noted* supra *p.* [illegible].

ABBOTT v. ANDREWS.

Imp. O. 55, r. 1; Ont. rule 428—Costs—Jury trial—Nonsuit on some issues—Practice when judgment ambiguous as to costs.

When in an action tried by a jury, the plaintiff [illegible] costs upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled, under the above rule, to the costs of the issues upon which the plaintiff is nonsuited.

When a judgment is ambiguous as to costs, the proper course is, not to appeal from the [illegible] order refusing to tax the costs of one of the issues, but to apply [illegible] tried the case [illegible] any ambiguity.

[illegible] Grove, J.

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[illegible] Q.C., *Hagg* with him, for the

[illegible] for the defendant, the Bank.
[illegible] for the defendant Rochester.

[illegible] J.; Ferguson, J.] [illegible]

FALLIS v. HARVEY.

Mortgage of redemption Limitations Parties R.S.O. c. 107, sects. 11, 19, 20, 35.

[illegible]

the length of showing that the courts have under that rule granted final judgment on admissions in the pleadings. There does not appear to have been any case in which it has been applied as it is here sought to be applied in respect of a counter-claim, but it seems in principle that the counter-claim must, for this purpose, stand on the same footing as an action.

[NOTE.—*The Imp. and Ont. rules are not identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Proudfoot, J.] [June 14.

SIEVEWRIGHT v. LEYS.

Executors—Compensation—Rests—Master's report.

Although R. S. O., c. 107, sect. 41, does not render it necessary for the Court to allow compensation to an executor in every case, no matter how flagrant his misconduct, yet neglect of duty by an executor, such as retaining money in hand that should have been applied in payment of mortgage debts, and of such magnitude as to justify charging him with interest and rests, is not enough to deprive him of commission, nor even of the costs of the suit.

The course of decision has been that an executor or trustee will be allowed his commission, though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even made to pay costs.

In this case, therefore, where merely a balance had been found against the executor, some of the items of which were the result of a surcharge:—

Held, not such a case as to induce the Court to discharge him of his commission.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to to charge the executor in this way, if it is intended to appeal, he should be required to report the facts to enable the Court to determine on the propriety of his decision.

Quære, whether it is not the more proper course to bring the matter up on further directions with all the materials for consideration spread out on the report, rather than to appeal in such a case.

Kingsford, for the plaintiff, appellant.

Moss, Q.C., for the defendant, respondent.

Proudfoot, J.] [June 14.

SAYLOR v. COOPER.

Rights of way—"Premises"—Parties.

Defendant and one A. H. Saylor, being owners of adjoining lands, on December 29th, 1865, executed a deed whereby in consideration of $30 the defendant granted to A. H. Saylor one acre of his land, not immediately adjoining Saylor's land, and the deed then proceeded thus:—"And I further convey the right of way . . to cross my land from the highway . . to the land owned by A. H. Saylor . . and the said A. H. Saylor is to make good all damages . . together with all the appurtenances thereto belonging, to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of the party of the third part, his heirs and assigns for ever."

By deed of August 20, 1872, the defendant conveyed to A. H. Saylor five acres adjoining the latter's land, but these five acres were not accessible without passing over the lands of the defendant or of some other person. By deed of January 3, 1880, A. H. Saylor agreed to sell to the plaintiff his lands—"And all rights and privileges contained in deeds from Cooper to A. H. Saylor" for $6,000.

Held, the plaintiff was entitled to a way of necessity to the five acres conveyed by deed of August 20, 1872, for since the defendant sold them a way of necessity was acquired, by implied grant, over the land.

Held, also, by the deed of December, 1865, a right of way became appurtenant to A. H. Saylor's land, and it was not a mere way in gross that was created.

Held, also, though the word "premises" is often used as applicable to the land conveyed, there is no rule requiring it to be limited in that way, but it is wide enough to cover all that goes before in the the deed, and, therefore, it could not be contended that the word "premises" in the deed of December, 1865, only applied to the land, and that the grant of the right of way was personal to A. H. Saylor.

Held, lastly, as regards the claim to the way of necessity which could only pass with the grant of the soil, it was necessary that the owner of the legal estate should be before the Court.

L. Wallbridge, for the plaintiff.

Moss, Q.C., for the defendant.

Ferguson, J.] [June 21.

CARMICHAEL v. SHARP.

Partnership action—Costs.

In this action the plaintiff claimed to have a partnership, which had existed between himself and the defendant, wound up, and to have all the necessary accounts taken, alleging that the latter had not properly carried out an agreement entered into at the time of the dissolution of the said partnership, by which the defendant was to wind up the affairs of the firm, and that he had not duly accounted to him in respect thereto. The defendant alleged that he had accounted, but that the plaintiff had not accounted to him for partnership moneys received. On reference the Master reported that the defendant had received more than his share of the firm moneys, and ordered him to pay the plaintiff the balance due.

Held, on further directions, the defendant must pay the said balance and the costs of the suit.

A. Hoskin, Q.C., for the plaintiff.

Farewell for the defendant.

Proudfoot, J.] [June 22.

DOBELL v. THE ONTARIO BANK.

Bank agent—Guarantee not under seal—R. S. O. c. 121.

In this case the defendant Rochester, on May 3, 1877, entered into a contract to sell to the plaintiffs a certain number of pine deals, which he delivered except 108 standards. On Nov. 20, 1877, being indebted to the defendants, the Bank, for advances, he gave as security a warehouse receipt for 108 standards. Afterwards, both defendants being anxious to realize on these pine boards, offered to deliver them to the plaintiff as a performance of the balance of the above contract of sale. The plaintiffs, however, required a guarantee from the Bank that the pines should be satisfactorily culled, and any deficiency be paid for by the Bank. The Board of Directors of the Bank, thereupon, resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. The head-manager notified the local agent of this, and told him to get a culler to examine the lumber. The latter, however, did not do this, but, with the assent of the former, nevertheless gave the guarantee. This document purported to "guarantee on behalf of the Bank" that the said deals should be satisfactorily culled, previous to shipment in the Spring. It was not under seal. On receiving it, the plaintiffs paid the Band for the lumber, but not until the Bank had been informed, at their head office, of the guarantee having been given. The culling did not turn out satisfactory, and the question was, whether the Bank was liable for the deficiency resulting, as well as Rochester.

Held, the Bank was liable on the guarantee, for the plaintiffs were warranted in assuming that the agent giving it had the necessary authority; and if the plaintiffs repudiated it, they ought to refund the money.

Semble, the above guarantee did not come within the description of a guarantee for the act of a thind party, for the Bank were selling, under R. S. O., c. 121, by virtue of being holders of the warehouse receipt, and giving the guarantee was an ordinary transaction, necessary to effect a sale, and was not within the class of cases requiring the sanction of a seal.

McCarthy, Q.C., (*Hogg* with him), for the plaintiff.

Blake, Q.C., for the defendant, the Bank.

Walker, for the defendant Rochester.

Proudfoot, J.; Ferguson, J.] [June 22.

FAULDS v. HARPER.

Equity of redemption—Limitations—Parties—R.S.O., c. 108, sects. 11, 19, 20, 43.

The equity of redemption is an entire whole, and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all, and the mortgagee must submit to redemption as to the whole mortgage.

Hence, in this suit, which was one for redemption of a mortgage of land where the mortgagor had died intestate in 1858, leaving

certain children, the plaintiffs herein, some of whom, if they had been alone, would have lost their right to redeem by lapse of time under R. S. O. c. 108, sects. 19, 20.

Held, nevertheless, since some of the children had not been adult for the necessary period of five years preceding the filing of the bill herein, none of the plaintiffs were barred by the statute.

R. S. O., c. 108, sect. 11, only applies to contests between the joint owners, and it is not correct to say that R. S. O., c. 108, sect. 43, relating to disabilities, has no application to morgage cases.

Hall v. *Caldwell*, 8 U. C. L. J. 93, declared binding in this country, on this point, notwithstanding *Forster* v. *Patterson*, L. R. 17 Ch. D. 132, and *Kinsman* v. *Rouse*, ib. 104.

One of the children surviving the mortgagor died under age and intestate in April, 1868.

Held, the present suit enured to those entitled to her share, including her mother as tenant for life thereof under R. S. O. c. 105, sect. 27.

Held, also, her mother should be directed to be made a party in the Master's office under G. O. 438, since the present case did not fall under the Judicature Act.

Semble, if the present case had fallen under the Judicature Act the same might have been directed under Rules 89.

Street, for defendant Harper, who rehears.

W. Cassels, contra.

Proudfoot, J.] [June 22.

HOWES V. THE DOMINION INS. CO.

Subrogation by insurers to rights of mortgagee—Unconditional clause — Evidence — Material increase of risk.

This was a suit to redeem a mortgage. The plaintiff mortgaged certain lands to a Loan Company, covenanting to insure the same. Afterwards, at the plaintiff's request and on his behalf, the agent of the Loan Company insured the premises in the name of the Loan Company, with the defendants, and held the policy as collateral security to the mortgage; and the plaintiff paid the premium. The plaintiff's name was specified as owner both in the application for the policy made by the agent of the Loan Company, and in the policy itself. On the face of the policy it appeared that the loss, if any, was payable to the Loan Company, and the policy also contained what is called the "unconditional" or "subrogation" clause. The policy, moreover, purported to be an insurance of the property itself. A fire having occurred, the defendants paid the Loan Company the whole amount of their claim on the mortgage, and obtained from them an assignment of the mortgage. Before this assignment the defendants had notice of the plaintiff's claim to have the amount to be paid under the policy of insurance credited on his mortgage.

Held, the policy was a general insurance of the policy itself, and not merely of the mortgagees' interest, and parol evidence was not admissible to prove that the Loan Company and the defendants, in effecting the insurance, had under consideration only the interest of the mortgagees.

Semble, such evidence might have been admissible, if any case had been made for rectifying the policy, as having been executed under a mistake.

Held also, the unconditional clause itself afforded some evidence that an interest in the mortgagor was recognised, and that the defendants were not insuring merely the debt due the mertgagee.

Held further, the plaintiff having done no act avoiding the policy, was, in redeeming his mortgage so assigned to the defendants, entitled to have credit allowed for the amount paid by the defendants to the Loan Co. under the policy, although the defendants were not aware, and did not assent to the plaintiff paying the premium.

Among the conditions endorsed on the policy was one avoiding it on any change of occupation of the premises being made material to the risk, and within the control and knowledge of the assured. On the policy there was an endorsement to the effect that "this property used to *store* doors and sashes;" but the application for the policy stated that the property had been used as a bending factory, and that it was intended to be used as a *sash factory*, and inasmuch as this application was by the policy made a part thereof, and a warranty by the assured:—

Held, the property might be used as a sash factory, although a sash factory is undoubtedly more hazardous than a bending factory.

Held also, the use of the premises for ripping

timber for building, as well as for the mere proper purposes of a sash factory, did not increase the risk in such a way as to avoid the policy under the above condition.

W. Cassels, for the plaintiff.

Martin, Q.C., for the defendants.

PRACTICE.

Proudfoot, J.] [June 21.

JOHNSON v. BENNETT.

Equitable execution.

Motion for judgment. Plaintiff claims a debt of $200 from the defendant. Defendant did not appear to the writ. The only property the defendant owned was the equity of redemption in certain lands, on which there were two mortgages, one held by the plaintiff, the other outstanding in other hands. Plaintiff now asked for judgment for $200 and interest, and for a decree for sale of the equity of redemption.

Held, on authority of *Carr* v. *Styles*, 26 Gr. 309, plaintiff could have judgment as asked, notwithstanding that in this case there were no *fi. fas.* in the sheriff's hands.

W. Cassels for the motion.

Master in Chambers.] [June 28.

PECK v. PECK.

Interim alimony, time to make application for—Chy. G. O. 489.

An application for interim alimony should not be made till the statement of defence is filed, or till the time for filing it has expired. Chy. G. O. 489 is unrepealed and applies by analogy to statements of defence.

In an action for alimony

G. M. Evans, for the plaintiff, moved for an order for payment by the defendan to the plaintiff of $16 a month as and for interim alimony.

N. W. Hoyles, for the defendant, contended that as the statement of claim was not filed no defence had been filed, and this application was prematurely made. He referred to Chy. G. O. 489.

THE MASTER IN CHAMBERS held that the application was prematurely made, as Chy. G. O. 489 is still in force, and now applies by analogy to the filing of the statement of defence. Motion dismissed without costs.

CORRESPONDENCE.

Constitutional Law—The Thrasher Case.

To the Editor of the LAW JOURNAL.

The letters which have appeared in your columns, in reply to my communication of 1st May, respecting the *Thrasher Case*, may seem to some of your readers to require a rejoinder from myself.

But it is with great reluctance that I again recur to this subject. I deem it quite undesirable to intrude personalties upon the public, and had therefore determined to refrain from any notice of the acrimonious letter signed "One of your Readers." But the subsequent letter from "An Exile," which took similar ground of objection to the views I had ventured to propound upon this vexed question, seemed to call for some remarks in explanation. This letter was written with the calmness and dignity befitting the discussion of such a weighty matter, and was, moreover, enriched by much interesting information, evidently from an authentic source, in regard to the framing of the British North America Act. The tone of the contribution from "One of your Readers," on the contrary, was not calculated to encourage a frank and courteous interchange of thought upon a difficult constitutional question. The writer is apparently impressed with the idea that it is great presumption for a layman to criticise a judicial utterance, and that any adverse opinions from such a quarter must necessarily be crude, unsound and unworthy of attention.

But inasmuch as my life-long studies have led me to devote much earnest and careful consideration to the Imperial statute which forms the basis of our present constitution, as well as to all the judicial interpretations of its various sections which have emanated from the Bench, whether of Canada or of the mother country, I may, perhaps, be permitted to state the conclusions at which I have arrived, upon any question arising out of this famous enactment, without being justly charged with dogmatism or impertinence.

My observations upon the judgment in the *Thrasher Case* were confined to the simple point as to whether "the Supreme Court of British Columbia is not within the description of those Courts in which alone procedure is controllable by the Local Legislature,"—"and therefore, by

the sweeping force of section 91, is reserved exclusively to the authority of the Dominion Parliament." In fact, the pith of the whole contention is involved in this enquiry.

This surely is a question upon which a difference of opinion is allowable. If so, I fail to see what objection can be reasonably entertained to the expression of the views which I hold upon it. Free discussion is helpful to the elucidation of truth, so long as it is conducted with propriety and forbearance on both sides. This rule I have sought to follow. Whether it has been equally respected by my opponent I leave your readers to decide.

The brevity of my remarks upon the point at issue has been complained of. But I must say in answer to this, that I took pains to state the substance of my argument with the utmost possible conciseness. By general consent the whole question turns upon the query above stated, and this is one of fact as well as of law. Abstractly considered, the expediency of relegating matters of such high import as the provincial administration of justice to the exclusive jurisdiction of the Local Legislatures of Canada, might reasonably admit of dispute. But the fact that Lower Canada was unwilling to enter Confederation unless secured against the possibility of outside interference with her juridical system is notorious, and will serve to explain this, as well as some other peculiar features in the British North America Act. Upon the constitutional question I was careful to urge whatever occurred to me as being material in support of the opinions expressed, as a slight contribution towards the final determination of this important issue. I now gather from "Your Reader's" letter, that the *Thrasher Case* is about to be submitted to the Supreme Court of the Dominion, a tribunal of acknowledged competency to decide upon it. Under these circumstances it would be superfluous and unbecoming in me to attempt to prolong the controversy.

I cannot refrain, however, from noticing two or three statements in "Your Reader's" letter. He says, "the change of [my] opinions in the Letellier case should have taught [me] a lesson." I am at a loss to imagine what your correspondent means by this assertion. For it is well known to all who care to ascertain the fact, that I have never altered my published opinions on the Letellier question in the slightest particular.

Again, "Your Reader" insinuates that I "may possibly have received communication, perchance at Ottawa, perchance at Victoria, or elsewhere, which has, may be unconsciously, had an influence in biassing [my] mind." Really this supposition is a poor substitute for argument, and a very unworthy weapon of attack. I might content myself with the assertion that this assumption is utterly untrue. But I will go further, and say that my opinions, be they sound or unsound, are exclusively my own, and that I have purposely refrained from inviting discussion with any one upon the matter. I know nothing of the sentiments of any person, either in Ottawa, Victoria or elsewhere, upon the merits of the *Thrasher* judgment, save only what I have seen in print, with the solitary exception of the opinions voluntarily expressed to me by two leading lawyers of Ontario, who both concurred in endorsing the position taken in my letter of May 1st to your journal. One of them added that he should have been disposed to press my conclusions still further. Were I at liberty to mention the names of these gentlemen, they would be recognized by common consent as two of the most able and experienced constitutional lawyers in Canada.

I have only to add, in reference to "Your Reader's" expressed surprise at my assertion that the British Columbia Judges had in vain appealed for support against the Local Legislatures to the Imperial as well as to the Dominion Governments—a statement which he declares I must have gathered from some source outside of the judgment,—that I find my warrant for it in Mr. Justice Crease's remarks (pp. 37, 38 of the *Thrasher Case*), where he refers to a protest, signed by all the Judges of the Court, addressed "to the Minister of Justice, and (it being ultimately possibly an Imperial matter) to the Secretary of State." But, it is added, "their most urgent representations to both Governments failed to elicit one single legal reason in answer to their respectful protests."

It is undoubtedly a subject for regret that the Dominion Government has not, so far as we know, seen fit as yet to authorize an investigation into the grievances complained of by the British Columbia judiciary. For while the jurisdiction of the Provincial Legislatures in all matters assigned to them in the distribution of powers, by the 92nd section of the B. N. A. Act,

is absolute as well as "exclusive," and cannot be impaired by any legislation of the Dominion Parliament,—to which, therefore, it is in vain to appeal for the redress of any complaint or inconvenience resulting from the operation of this statute,—there still remains the supervisory control of the Crown over all acts of legislation, whether within or without the competency of any Colonial or Provincial Legislature, to which resort can be had to remedy whatsoever grievances may arise out of local legislation.

The limits within which this prerogative power is exercisable in Canada under our existing constitution, I have sought to explain in my work on "Parliamentary Government in the Colonies," p. 358, *et seq.*

Furthermore, I would express my conviction that the remedial exercise of this control of the Crown—however sparingly it may and ought to be invoked—is unquestionably the keystone of the fabric of Confederation, and the only power which can be legitimately put forth to uphold unity of action, and to secure the adoption of sound principles of legislation in the various provinces of our wide-spread Dominion.

A great responsibility rests upon our statesmen in this matter. They are bound, on the one hand, not to yield to sectional outcries against the lawful and appropriate exercise of the prerogative of disallowance; and on the other hand, to be exceedingly careful that this prerogative is never made use of for party purposes, or otherwise than to protect and promote the general interests of Canada.

ALPHEUS TODD.

Ottawa, June 20, 1882.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

BANKING.

The History, Law and Practice of Banking, with an appendix of statutes. By Charles M. Collins. London, 1882.

BUILDING LEASES AND CONTRACTS.

The Law relating to Building Leases and Contracts, the improvement of land by and the construction of buildings, with a full collection of precedents of agreements for building leases; building leases, contracts for building, building grants, and other forms with respect to matters connected with building; together with statutes relating to building, with notes and the latest cases under the various sections, and a glossary of architectural and building terms. By Alfred Emden. London, 1882.

CLAIMS AND DEFENCES.

Forms of Claims and Defences in the Chancery Division of the High Court of Justice, with notes containing an outline of the law relating to each of the subjects treated, and an appendix of forms of endorsement on the writ of summons. By C. Stewart Drewry. London, 1876.

CONVEYANCING ACT.

Common Precedents in Conveyancing, together with the Conveyancing and the Law of Property Act, 1881, and the Solicitor's Remuneration Act, 1881. By Hugh M. Humphrey. London, 1881.

CONVEYANCING.

The Conveyancing and Law of Property Act, 1881, and the Vendor and Purchaser Act, 1874, with notes. By W. Manning Harris and Thomas Clarkson. London, 1882.

CONVEYANCING.

The Conveyancing and the Law of Property Act, 1881, being an Act to simplify conveyancing, with introduction, summary and practical notes and conveyancing precedents; and an appendix, containing Lord Cranworth's Act, 1860, The Vendor and Purchaser Act, 1874, The Settled Estates Act, 1877, and The Solicitor's Remuneration Act, 1881; with careful cross references and copious index and forms for use under the Act. By J. S. Rubinstein. 3rd edition. London, 1882.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Effect of the death of an acceptor of a bill of exchange, blank or to drawer's name.—*Irish Law Times*, June 10.

Liability of agents in actions based on fraud.—*Ib.*

Contracts of carriers of goods.—*Irish L. T.*, May 27.

Counter-claim on counter-claim.—*Eng. L.J.*, May 13.

Surviving causes of action.—*Ib.*, June 3.

Duty of Railroad Company to trespasser on its track.—*Albany L.J.*, April 22.

Sale of intoxicating liquor by druggist.—*Ib.*, May 13.

Wagers on horse races.—*Ib.*, May 27.

Emblements—Second crop—Plowing in oat stubble.—*Ib.*, June 17.

Rights and liabilities arising thro' the promotion and formation of a corporation.—*Am. Law Rev.*, May.

Constructive total loss.—*Ib.*

What shall be done with the reports.—*Ib.*, June.

Preferred stock.—*Ib.*

The action for the malicious prosecution of a civil suit.—*Ib.*, May and June.

Causing death by neglect of duty.—*Central L. J.*, June 2.

Imposition of licenses by municipal corporations.—*Ib.*

Defrauded vendors of chattels.—*Ib.*, June 9.

Collateral securities.—*Ib.*, June 16.

The rights and duties of a bailee towards rival claimants of the goods.—*Ib.*

Statutory provisions for leasing railroads.—*Ib.*, June 23.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

During this term the following gentlemen were called to the Bar, namely :—

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely :—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely :—

Graduates—Archibald Cilchrist Campbell, Alex. W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Sneddon, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Reilly. Articled Clerks—E. Considine, D. A. Cameron.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.	Arithmetic. Euclid, Bb. I., II., and III. English Grammar and Composition. English History Queen Anne to George III. Modern Geography, N. America and Europe. Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23. Cicero, Pro Archia. Virgil, Æneid, B. II., vv. 1-317. Ovid, Heroides, Epistles. V. XIII.
1883.	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cæsar, Bellum Britannicum. Cicero, Pro Archia. Virgil, Æneid, B. V., vv. 1-361. Ovid, Heroides, Epistles, V. XIII.
1884.	Cicero, Cato Major. Virgil, Æneid, B. V., vv. 1-361. Ovid, Fasti, B. I., vv. 1-300. Xenophon, Anabasis, B. II. Homer, Iliad, B. IV.
1885.	Xenophon, Anabasis, B. V. Homer, Iliad, B. IV. Cicero, Cato Major. Virgil, Æneid, B. I., vv. 1-304. Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

Canada Law Journal.

VOL. XVIII. AUGUST 1, 1882. No. 14.

DIARY FOR AUGUST.

2. Wed.. Battle of the Nile, 1798.
6. Sun... *9th Sunday after Trinity.* Prince Alfred born, 1844.
9. Tue... Second Intermediate Examination.
10. Wed.. Second Intermediate Examination.
10. Thurs. First Intermediate Examination.
11. Fri.... First Intermediate Examination.
13. Sun... *10th Sunday after Trinity.* Sir Peregrine Maitland Lieut.-Governor U. C., 1818.
15. Tue... Primary Examination.
16. Wed.. Primary Examination.
18. Fri.... Gen. Hunter, Lieut.-Governor U. C., 1799.
20. Sun... *11th Sunday after Trinity.*
21. Mon.. Long vacation ends.
22. Tue... Judicature Act came into operation, 1881.
23. Wed.. Final Examination for Attorney.
24. Thurs. Final Examination for Call,
25. Fri.... Francis Gore, Lieut.-Governor U. C., 1806.
27. Sun... *12th Sunday after Trinity.*
28. Mon.. Trinity Term (Law Society) begins.
31. Thurs. Long vacation in Ct. of Appeal and Supreme Ct. ends.

TORONTO, AUGUST 1, 1882.

THE reporter of the Chancery Division desires us to state that gentlemen requiring copies of the judgments in his custody, during his absence from town, are requested to address their letters as usual, when they will be immediately attended to.

WE catch a faint echo of the usual vigorous language of the Master of the Rolls, in the brief note of *May* v. *Thompson*, W. N. 1882, May 27, wherein it is reported: "Jessel, M. R., said that the Court had gone quite far enough in spelling out contracts from letters." The Master of the Rolls' judgments are, indeed, a constant source of amusement combined with instruction. Thus, in the recent case of *ex parte Hall*, L. R. 19 Ch. D. 580, he says: "This case reminds me of one in which I likened the plaintiff's case to a colander, because it was so full of holes."

IT is remarked by the *Law Journal* that the case of *Toke* v. *Andrews*, noted some weeks ago in Notes of Cases, seems to carry the right of counter-claim much further than has hitherto been allowed. The defendant was permitted to counter-claim in respect of rent which had accrued due since the writ was issued, while the plaintiff was allowed a similar privilege in respect of a cause of action which he could not assert in his statement of claim although it had accrued, because the statement of claim dates from the writ. If counter-claims upon counter-claims are to be allowed, it is difficult to see how an action can ever end, when there is a relation like that of landlord and tenant between the parties.

THE following notice has been issued from the Chancery Division of the High Court of Justice:—During vacation applications of an urgent nature in the Chancery Division are to be made to His Lordship the Chancellor. He will be at Osgoode Hall at 11 a.m. on each Tuesday. Papers relating to applications are to be left with the Registrar or Assistant Registrar on the previous Friday. Applications for leave to serve notice of motion may be made to the Registrar or Assistant Registrar. In any case of urgency the brief of counsel is to be sent to the Chancellor, accompanied by copies of the affidavits in support of the application, and also by a minute, on a separate sheet of paper, signed by counsel of the order he may considered the applicant entitled to, and an envelope capable of receiving the papers, addressed as follows, "To the Registrar of the Chancery Division of the High Court of Justice (Vacation Business), Osgoode Hall, Toronto," and containing stamps for postage. On applications for injunction or writs *ne exeat Provincia*, in addition to the above there must also be sent the writs of summons.

The papers sent to the Chancellor will be returned to the Registrar's office. The Chancellor's address can be obtained on application to the Registrar's office.

FUSION OR CONFUSION—WHICH?

The avowed object of the Judicature Act was to attempt to establish one Court in the place of four, and to provide for that one Court in all its Divisions a uniform system of practice. This was a laudable scheme, but we venture to doubt whether the judges are taking the course best calculated to carry out the intentions of the Legislature.

The Legislature say in effect there shall be one practice for all the Divisions of the Supreme Court. The judges in effect say that there shall be one practice for the Queen's Bench and Common Pleas Divisions and another for the Chancery Division.

The judges, we believe, conceive themselves to be the victims of circumstances, and compelled by the terms of the Act and rules to perpetuate in their respective Divisions the practice which formerly prevailed in the Courts from which the Divisions were constituted, wherever that practice has not been expressly altered by the rules.

This line of action is supposed to be based on the 12th and 52nd sections of the Act, and on the note at the commencement of the rules, where it is said, "Where no other provision is made by the Act or these rules the present procedure and practice remain in force." But although all these provisions are taken almost *verbatim* from the English Act and rules, yet the judges there have come to a very different conclusion as to the construction to be placed upon them, and instead of thinking themelves bound to perpetuate divergencies of practice in the different Divisions, have felt it their duty, as far as possible, to assimilate by judicial decision the practice in all the Divisions. The leading case, we think, on this point is *Newbiggen-by-the-Sea Gas. Co.* v. *Armstrong*, 13 Ch. D. 310. In that case the question arose as to the proper form of an order to stay an action commenced by a solicitor without authority. In this respect there was a difference between the former practice at law and in equity; and the rule was laid down by the Court of Appeal that in cases where no rule or practice is laid down by the Judicature Rules, and there is a variance in the old practice of the Chancery and Common Law Courts, *that practice is to prevail which is considered by the Court most convenient*, Sir Geo. Jessel, M. R., remarking that "by the 21st section of the Judicature Act, 1875 (see O. J. A. sec. 52). it is enacted that in cases where no new method of procedure is prescribed the old practice is to prevail, *but where there is a variance in the practice it does not say which practice.* I have no hesitation in saying, as I have already said at the Rolls Court, though not with the same authority with which I now say it, that I think the Common Law practice in this case is founded on natural justice, and ought to be followed for the future." There the order under review had followed the former Chancery practice

It may be asked how the suitor is to know which practice to adopt when there has been no judicial decision determining which of the two different modes of practice is the most convenient. It would seem, according to Sir Geo. Jessel's gloss on sec. 21, that the answer to that, is that the suitor may select either the former practice at law or in equity in all cases not provided for by the rules; but when any question arises before the Court as to the proper practice, then the Court is to determine the question, not by the rule of what was the former practice in the particular Court from which the Division in which the action is pending was constituted, but, on the contrary, by considerations as to which of the differing modes of practice is most convenient to be adopted in future in all the Divisions.

By this means the present differences in practice which still exist would in time dis-

appear, but by stereotyping the old practice, as has been done by some recent decisions, and by still further accentuating the difference in practice by passing rules of Court making one practice for the Q. B. and C. P. Divisions, and another for the Chancery Division, as has been recently done, the evils of the old system are kept alive and much of the good the Judicature Act was intended to accomplish will not be attained.

Why in the simple matter of enforcing a judgment of the Court of Appeal there should be two modes of practice we are at a loss to understand. At law the certificate of the Court of Appeal was entered on the judgment roll and was acted on without further order, *McArthur* v. *Southwold*, 8 Pr. R. 27. This practice is still in the Q. B. and C. P. Divisions. In Chancery the practice since *Weir* v. *Matheson*, 2 Chy. Ch. R. 10, was to make the certificate of the Court of Appeal an order of the Court of Chancery. This practice, which appears to be quite unwarranted by the Appeal Act R. S. O., ch. 38, sec. 44, which says that "the decision of the Court of Appeal shall be certified by the Registrar of the Court of Appeal to the proper officer of the Court below, *who shall thereupon* make all proper and necessary entries thereof, and subsequent proceedings may be taken thereupon, as if the decision had been given in the Court below," and which is also inconsistent with the practice of the Court of Chancery itself under the Supreme Court Act, 38 Vict., ch. 11, sec. 46 (D), which is in the same terms as the 44th sec. of the Ontario Appeal Act, is nevertheless we see still to be followed in the Chancery Division. The new Rules 522, 523, 524, 527 also appear to us to create needless differences of practice in the Divisions of the High Court and are therefore in our judgment altogether contrary to the spirit and intention of the Judicature Act. The object of all law should be the attainment of justice, and the removal of all hindrances to that great end. To multiply differences of practice in the different Divisions of the same Court is in effect to put obstacles in the way of justice, and to expose suitors to loss and inconvenience.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

MCLEAN ET AL v. THE QUEEN.

Petition of right—Parliamentary contract for printing, breach of—Petition of right does not lie—Departmental contract for printing, breach of—"All the printings"—Demurrer.

The plaintiffs filed a petition of right, claiming that under their contracts with Mr. Hartney, a clerk of the House of Commons, on behalf of the Parliament of Canada and the Government, they were entitled to *all* the parliamentary and departmental printing. The Crown demurred to the petition. It was argued, in the Exchequer Court, that the Crown was not liable on a contract made with Parliament, and that in respect of the contract for departmental printing the contractor alone was bound, the Crown being free to have the work done by other parties.

HENRY, J., in the Exchequer Court, gave judgment in favour of the petitioners in respect of both contracts. On appeal to the Supreme Court,

Held by RITCHIE, C.J.—That the Crown could not be liable under the contract made with Parliament, but that in respect of the contract for the departmental printing, the Crown was liable equally with the contractor; that when the contractor was bound to do *all* the work, the other party was bound to give him *all* the work required to be done. This judgment was concurred in by STRONG and FOURNIER, JJ., TASCHEREAU and GWYNNE, JJ., dissenting.

Demurrer as to contract with Mr. Hartney, for the parliamentary contract maintained, but demurrer as to departmental contract overruled.

H. S. Macdonald and *J. J. Gormully* for suppliants.

Lash, Q.C., and *Hogg* for the Crown.

THE MERCHANTS BANK v. THE QUEEN.

Petition of right—C.S.C., ch. 28; 31 Vict. ch. 12—Slide and boom dues—Chattel mortgage—Agreement between Crown and mortgagor of lumber, effect of—Lien.

This was a petition of right, filed by the appellants, praying that a seizure of a quantity of

logs, which was made by the government collector for arrears of slide dues, owed by one R. S., for the logs seized and other logs, be removed, and that the sum of $5,267, which had been paid by the appellants to the Crown under duress, be refunded to them.

R. S., being indebted to the appellants in a large sum of money, had given them, as collateral security for the amount of his debt, two chattel mortgages on certain logs and timber. These mortgages were executed, the first on 12 December, 1867, and the second on 11 May, 1877. On 15 May, 1877, R. S. became insolvent, and in 1878 the equity of redemption of the insolvent in the chattel mortgages was duly released to appellants by R. S.'s assignee. In June, 1877, R. S., who owed also a large sum of money to the Government for slide dues for several years back, agreed to pay $2 per 1000 feet, B. M., on all lumber to be shipped by him through the canals. The dues recoverable by statute for each log were 4⅓ cents, equal to about 26 cents per 1000 feet, B. M. The appellants claimed that this arrangement was unknown to them. The evidence of its ratification by the appellants was contradictory.

In 1878, when the appellants began to ship the lumber in question on barges, the collector of slide dues refused to allow the barges to pass through the canals until the appellants paid the $2 agreed upon between R. S. and the Government. They paid a certain amount under protest, but finally the collector seized and took possession of all the logs and timber on R. S.'s premises, on behalf of the Government.

GWYNNE, J., in the Exchequer Court held that R. S. was agent for the appellants and that he had created a general lien or charge on the lumber mortgaged to the appellants, in favor of the Crown, for the dues he owed them, and that the appellants had knowledge of and ratified such arrangement.

On appeal to the Supreme Court,

Held, (STRONG and TASCHEREAU, JJ., dissenting), that the relation between appellants and R. S., was in no sense that of principal and agent, and that there was no evidence whatever of any contract, express or implied, of a general lien or charge on this timber, so as to bind or affect this timber in the hands of the appellants, to whom the same had been conveyed for valuable consideration, while not cognizant of or parties to such contract.

That all the Government were entitled to on the said lumber, under the statute and the regulations was the sum of 4⅓ cents per log passing through the slides, equal to 26 cents per 1000 feet, B. M., which sum appellants offered to pay. And that R. S., after the execution of the chattel mortgages in favor of appellants, had no right to create in favor of the Crown a lien or charge on the lumber in question, to secure the payment of his own indebtedness.

Bethune, Q.C., and *Gormully*, for appellants.
Lash, Q.C., and *Hogg*, for the Crown.

MCCALLUM v. ODETTE.

"THE M. C. UPPER."

Appeal from the Maritime Court of Ontario—Cross appeal—Collision with anchor of a vessel—Contributory negligence—Damages, apportionment of—Court equally divided.

On the 27th April, 1880, at P. K., on Lake Erie, where vessels go to load timber, etc., and where the *Erie Belle*, the respondent's vessel, was in the habit of landing and taking passengers, the *M. C. Upper*, the appellant's vessel, was moored on the east side of the dock, and had her anchor dropped some distance out, in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, without buoying the same or taking some measure to inform incoming vessels where it was. The *Erie Belle* came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the *M. C. Upper*, and was damaged.

On a petition, filed by the owner of the *Erie Belle*, in the Maritime Court of Ontario, to recover damages done to his vessel by the *M. C. Upper*, the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one half of the damages sustained by the *Erie Belle*.

On appeal to the Supreme Court by owner of the *M. C. Upper*, and cross-appeal by owner of *Erie Belle* :

Held, per RITCHIE, C. J., FOURNIER, and TASCHEREAU, JJ., that the evidence shewed that the damage was caused solely by the fault and negligence of the owner of the *M. C. Upper* and therefore the owner of that vessel should

pay the whole damage. Per STRONG, HENRY, and GWYNNE, JJ., that the accident happened through no fault or negligence on the part of the *M. C. Upper*, and therefore the appeal should be allowed.

The Court being equally divided, both the appeal and cross-appeal were dismissed without costs, and the judgment of the Maritime Court stands.

Robinson, Q.C., for appellant.

McCarthy, Q.C., for respondent.

MONAGHAN v. HORN.

"THE GARLAND."

Maritime Court of Ontario, jurisdiction of—Rev. Stats. Ont. ch. 128—Lord Campbell's Act—Action in rem against vessel for damages for death of a person by personal representative.

In a suit brought before the Maritime Court of Ontario against a foreign vessel to recover damages by the mother of a child under age, killed by negligence in a collision between two vessels.

Held, (TASCHEREAU, J. dissenting), that the Maritime Court of Ontario has no jurisdiction in the case of personal injury resulting in death apart from and independently of Rev. Stats. Ont., ch. 128, (a copy of Lord Campbell's Act), and as the plaintiff in this case has not brought her action as the personal representative of the deceased child, under and by virtue of said Act, she has *no locus standi*.

Per FOURNIER and HENRY, JJ., that the Maritime Court of Ontario has jurisdiction to entertain an action *in rem* against a vessel in cases of personal injury resulting in death, when brought at the instance of the personal representative of the deceased, under the statute.

Per TASCHEREAU, J., that independently of the statute the Maritime Court of Ontario has jurisdiction.

H. J. Scott for the appellant.

McCarthy, Q.C., for the respondent.

OLIVER v. DAVIDSON.

Will—Legacy—Whether absolute or conditional.

The question which arose on this appeal was whether a legacy or bequest of $1,600 to one Alex. Oliver, under the will of Wm. Oliver, was absolute and unconditional. In one of the paragraphs of the will, the following words occur: "Subject to the following conditions, *viz.*, that they unite in payment, &c.," and in another paragraph: "And further that Alexander and Duncan Oliver work on the farm until their legacies became due." The date mentioned in the will for the payment of the $1,600 bequest to Alexander, was 1st January, 1877, and prior to that date Alexander ceased to work on the farm, and went away and engaged in other pursuits.

Held, (HENRY, J., dissenting), that the construction of the paragraph in the will, bequeathing the $1,600 to Alexander must be based on a consideration of the whole will, and that the intention was that Alexander's right to receive his legacy was conditional on his remaining on the farm and uniting in earning it.

Bethune, Q.C., for appellant.

Bruce for respondent.

COURT OF APPEAL.

JUNE 30.

CAMERON v. CAMPBELL.

Devise—Trustee—Statute of Limitations.

A testator directed a sum of money to be invested, the interest whereof was to be employed in endeavouring to discover his brother, to whom the money was to be paid if discovered within five years from the death of the testator, and if not so found the amount to be paid to M. C., as fully stated, 27 Gr. 307.

Held, [affirming the decree there pronounced,] that the conduct of the executors constituted them trustees, and that the right to recover the money was not barred by the Statute of Limitations; and that C., into whose hands the money had come, was chargeable with interest from the time of its receipt by him.

Moss, Q.C., and *Watson*, for appeal.

Robinson, Q.C., and *Sidney Smith*, Q.C., contra.

PARKHURST v. ROY.

Devise to Government of foreign state—Supervision of trusts.

A testator directed his executors to pay and deliver the residue of his estate to the Government and Legislature of the State of Vermont, to be disposed of as to them shall seem best,

having regard to certain recommendations set forth in the will.

Held, [affirming the decree reported 27 Gr. 361, where the facts are fully stated,] that the State Government was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the state could not be made amenable to the courts of the state, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign state would not do anything to violate a trust; besides which it appeared that the legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the Courts.

W. Cassels and *Black* for the appeal.

Bethune, Q.C., and *Moss*, contra.

RICKER v. RICKER.

Duty of trustee—Liberty to bid at sale—Innocent purchaser.

The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree as stated, 27 Gr. 576.

Held, [reversing that decree,] that the liberty to bid accorded the plaintiff, who occupied the twofold character of mortgagee and trustee, was given him for the purpose of protecting his interest as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to, and at and about the sale, by means of which he had been enabled to make a profit at the expense of the infant *cestui que* trust was such as would have rendered the sale invalid if the land had remained in his hands, but as it had passed into those of an innocent purchaser the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or should pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the court below subsequent to the petition, and also the costs of appeal.

T. Robertson, Q.C., for appeal.

W. Cassels and *Duff*, contra.

EMMETT v. QUINN.

Lease, short form of—Covenant not statutory.

In a short form of lease the covenants therein were preceded by the words, prescribed by the Statute, of "The said (Lessee) covenants with the said (Lessor)," two of which covenants were that the lessee would erect a dwelling-house, etc., upon the demised premises, and leave the same and all buildings and fences so erected on the premises, thereon: And also that in the event of the buildings so erected being destroyed by fire during the term, he would rebuild to an equal amount. The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant and executed a mortgage to the defendant, and on the buildings being burnt down, rebuilt them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who also mortgaged the property to the defendant, and thereafter the buildings were again destroyed by fire.

Held, (1) [reversing the decree of BLAKE, V.C., 26 Gr. 420,] that the statutory words of covenant, in the absence of words making them expressly applicable, had not their statutory meaning when read with covenants not statutory, and therefore that the covenants above referred to applied to the lessor and lessee only.

Held, (2) [PATTERSON, J., dissenting,] that these covenants being in respect of something not *in esse* at the time of the creation of the lease, did not run with the land; "assigns" not being named.

Maclennan, Q.C., and *McClive*, for appeal.

P. McCarthy and *W. Cassels*, contra.

TURLEY v. BENEDICT.

Life lease—Proviso for re-entry—Ejectment.

The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry,

then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. The jury having found the facts as above stated:

Held, [reversing the judgment of the Court below,] that the defendant had, according to the terms of the lease, the right to the possession, and that the plaintiff must therefore fail in his action.

G. D. Dickson, Q.C., for appeal.

Bethune, Q.C., and *Clute*, contra.

HARRIS v. MUDIE.

Statute of Limitations—Partial possession—Defective paper title.

The Court will apply a more liberal rule of construction under the Statutes of Limitations in considering the effect to be given to a partial possession of land by a person claiming to have a supposed or defective paper title than to a mere trespasser, therefore:

Held, [CAMERON, J., dissenting,] that where a person having such a title to land makes an entry thereon he will be constructively in possession of the whole, while a mere trespasser must be taken, as against the true owner, to be in occupation of those parts only which he actually cultivates or has enclosed; and occasional acts of ownership on other parts of the land will not suffice to impliedly extend his possession.

Bethune, Q.C., and *McGee*, for appeal.

Maclennan, Q.C., and *G. M. McDonnell*, contra.

BROWN v. SWEET.

Chattel mortgage—R. S. O. ch. 95, sect. 13.

The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of $400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff, being one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the moveables contained in the church, which was prepared by a partner of the general solicitor of the trustees who was defending the action against them, but neither partner was called as a witness on the trial. In an interpleader issue the learned judge found for the defendant.

Held, [BURTON, J.A., *dubitante*, affirming the decision of the Common Pleas Division granting a new trial,] that the mortgage was not invalid under R.S.O. ch. 95, sect. 13, and the fact that all the moveable property of the mortgagors was included in the security, was not of itself sufficient to satisfy the Court of any fraudulent intent in making it.

Held, also, that the mere fact of the mortgage having been prepared by the partner of the solicitor for the trustees was not sufficient to impute to the plaintiff knowledge of the pending action against the trustees.

Bethune, Q.C., and *Fitch*, for appeal.

Kerr, Q.C., and *Walker*, contra.

THE QUEEN v. FRAWLEY.

B. N. A. Act, construction of—Power of Provincial Legislatures to imprison with hard labour.

The power of the Provincial Legislatures to pass laws for the purpose of compelling obedience to those enactments respecting subjects which, by the B.N.A. Act, are assigned specially to those bodies, is inherent in them aside from the 92nd section of the Act. The word "imprisonment" used in that section does not necessarily exclude the imposition of hard labour as part of the punishment, therefore:

Held, [reversing the judgment of the Court below,] that the Legislature of this Province has power to impose hard labour in addition to imprisonment.

Hodgins, Q.C., for the appeal.

McMichael, Q.C., contra.

THE QUEEN v. HODGE.

Provincial Legislatures—Delegation of powers to license commissioners under the B.N.A. Act.

The Legislature of the Provinces having been assigned the sole power of passing laws for the infliction of penalties and imprisonment for the

due enforcement of a law of the Province in relation to a matter with which it alone has power to deal; and the granting of licenses for the keeping of public houses and billiard tables for hire, being subjects over which the Provincial Legislature has exclusive jurisdiction.

Held, (1) that the enactment of the Statute (R. S. O. ch. 181,) rendering it illegal to sell liquor to infants, and restricting the hours within which billiard rooms in inns should be kept open, was not *ultra vires;* and (2) [reversing the judgment of the Court below,] that the Provincial Parliament had power to delegate its authority to the license commissioners.

Atty.-Gen. Mowat and *Bethune*, Q.C., for appeal.

J. K. Kerr, Q.C., and *S. H. Blake*, Q.C., contra.

SMITH v. GOLDIE.

Patentable invention.

The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under surface. The air chamber and the fan combined with the bolt or sieve were admittedly old; and it appeared that one B. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used.

Held, (affirming the judgment of SPRAGGE, C.), that the plaintiff's invention was not patentable.

Ferguson, Q.C., and *Howland*, for the appellant.

W. Cassels and *W. Ball*, contra.

WORKMAN v. ROBB.

Title by possession—Improvements in lieu of rent.

The defendant R. permitted the defendant L. to occupy certain lands, upon an agreement that he would improve them in lieu of rent, and would give up possession whenever R. required him to do so. The improvements, it was shewn, were all made after consultation with R., and there was no other acknowledgment of his title during thirteen years he was in possession.

Held, (affirming the judgment of PROUDFOOT, V.C., 28 Gr. 243, BURTON, J.A., dissenting), that L. could not set up a title by length of possession as against R., and *a fortiori* his creditor, the plaintiff, could not do so.

Moss, Q.C., and *Fitch*, for the appeal.

S. H. Blake, Q.C., contra.

HARVEY v. THE G. T. R AND G. W. R. COS.

Joinder of parties—Practice—Ont. J. A., rule 94.

The plaintiff shipped goods from St. Johns, Quebec, to Dundas, Ont., by the railway lines of the defendants, and the goods arrived at Dundas in a damaged condition. The plaintiff, being unable to determine which company was liable, joined both as defendants.

Held, (affirming the order of PROUDFOOT, J.) who had sustained the ruling of the Master in Chambers, 9 P. R. 80, that the case came within rule 94, and that the plaintiff was warranted in making both companies defendants.

McMichael, Q.C., for the G. W. R. Co.

J. K. Kerr, Q.C., for the G. T. R. Co.

Muir, contra.

NIXON v. MALTBY.

Landlord and tenant—Evidence of surrender.

In an action to recover a year's rent on a covenant in a lease for three years, it was shown that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and plaintiff entered, ploughed and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money, and had not been paid his insurance. It was shown that a proposition had been made to leave the matter to arbitration.

Held, [affirming the judgment of the Judge of the County Court of Peel,] that the acts of the plaintiff did not amount to an eviction, and that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover.

Fleming, for the appellant.

Laidlaw, contra.

QUEEN'S BENCH DIVISION.

JUNE 30.

LEIGHTON V. MEDLEY.

Landlord and tenant—Covenant to keep up fences—Removal of fences—Waiver.

Semble, the removal of fences from place to place on a farm is not a breach of covenant to repair, and where a landlord took rent after knowledge of the fact he was held to have waived forfeiture.

McCarthy, Q.C., for plaintiff.

Reeve, for defendant.

WINFIELD V. KEAN.

Malicious prosecution—Malice—Misdirection.

Want of reasonable and probable cause does not, as a matter of course, establish the malice necessary to the action, and where the judge told the jury not to trouble with the question of malice except as inferable from want of reasonable cause, and that if the information was laid without proper cause it was laid maliciously,

Held, misdirection.

Pepler, for plaintiff.

Lount, Q.C., for defendant.

GOODYEAR RUBBER CO. V. FOSTER.

Sale of goods—Acceptance—Waiver of excess of goods ordered.

The defendants, with knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiation took place for a reduction in price, but took into stock 15 out of 25 cases sent. The other 10 cases remained in bond till they were sold to pay duties.

Held, that the defendants had waived any objections as to the excess.

Pearson, for plaintiff.

C. H. Ritchie, for defendant.

ROBINSON V. HALL.

Mortgage—Payment—Transfer—Trespass.

A. became mortgagee of lands from B., who then sold the minerals, with right of mining, to defendant. On default in payment of the mortgage A. brought ejectment and issued writ of possession. On learning this defendant told B. he must pay the mortgage or give him an order to do so, and retain amount from the price of the minerals. An agreement was drawn up that defendant should either pay the mortgage or take a transfer to save B., defendant to have credit therefor on the sale of minerals to him, when defendant paid the mortgage, though the price of minerals was not due. B. then gave plaintiff possession at a rental, and defendant, having obtained a transfer of the mortgage and judgment in favour of A., ejected plaintiff.

Held, that defendant's payment was virtually one by B., and discharged the mortgage; and as it had been made to save B. as well as himself, defendant could not in equity have enforced the mortgage against B. or plaintiff, who could claim damages for the trespass. ARMOUR, J., dissenting.

Wallbridge, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

MCLELLAN V. MCKINNON.

Conviction—Hard labour—Amendment of sentence by sessions.

There is no power in the Sessions, under 32-33 Vict. cap. 31, sect. 68, to amend sentence in a conviction. They cannot, therefore, strike out "hard labour" from a conviction.

H. J. Scott, for plaintiffs.

Beaty, Q.C., for defendant.

EDGAR V. MAGEE.

Bill of exchange—Statute of limitations—Point of commencement.

Where a bill matured 1st December, 1875, and writ issued 1st December, 1881.

Held, that the statute began to run 2nd December, 1875, and action, therefore, began in time. CAMERON, J., dissenting.

J. K. Kerr, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

LAROCHE V. O'HAGAN.

Sale of vessel—Warranty—Breach—Loss—Damages.

A vessel on sale to defendant by plaintiff was warranted to class B 1, and insurable for $1,400, which the mortgage, securing the purchase money, covenanted to insure for. The craft

would not insure as B 1, and she was used uninsured, and was lost.

Held, that the measure of damage was what was necessary to make her class B 1.

Wallbridge, Q.C., for plaintiff.

Robinson, Q.C., and *W. H. P. Clement*, for defendants.

THURLOW v. SIDNEY.

Drainage—Rate—Award.

Arbitrators, on an appeal from surveyor's report by defendants, awarded under the Municipal Act that the deepening of a creek, etc., benefited lands in defendants' municipality, and that the defendants should pay $350, without mentioning the lands in Sidney, which the arbitrators considered benefited, nor charging them with a proper portion of the outlay therefor, as per sect. 535.

Held, that lands not being specified or charged in award, defendants could not comply with the Act, and award therefore bad.

J. K. Kerr, Q.C., (*Holden*, with him), for plaintiffs.

Wallbridge, Q.C., for defendants.

HARGREAVES v. SINCLAIR.

Slander—Repetition—Privilege.

Plaintiff assisted one C. in his shop, (that of a druggist,) over which defendant and her husband, a doctor, lived; C. being tenant of the latter. Plaintiff was charged by defendant, in presence of a witness, with taking $4 from her trunk. Of this C. was told by defendant's husband, and that plaintiff must be dismissed on pain of losing his (the husband's) prescriptions. A meeting having been arranged between the parties, in presence of the witness, to investigate the matter, as was stated, the slander was repeated, and the plaintiff was dismissed.

Held, a privileged occasion.

Bethune, Q.C., for plaintiff.

Robinson, Q.C., for defendant.

COMMON PLEAS DIVISION.

JUNE 23.

ROSENBURGER v. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Accident—Failure to sound whistle or ring bell—Collision—Evidence—Findings—New trial.

Action against the defendants for the omission to give the necessary statutory warning, namely, by ringing the bell and sounding the whistle on approaching a railway crossing, by reason of which the plaintiff's horse took fright and ran away, and injured the plaintiff.

Held, (WILSON, C.J., dissenting,) that sect. 104 of C. S. C., ch. 66, is not restricted to injuries caused by actual collision but extends also to the case, as here, of a horse taking fright at the appearance or noise of the train.

The jury in answer to the question:—"If plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "yes."

Held, that though this was not very definite, yet taken with evidence on which the jury acted, which is set out in the case, it was sufficient.

A new trial was also asked for on the ground of the verdict being against the evidence and weight of evidence, but was refused.

Ward Bowlby, for the plaintiffs.

Bethune, Q.C., for the defendants.

MURTON v. KINGSTON AND MONTREAL FORWARDING CO.

Bill of lading—Excess in quantity named therein—Right to—Custom.

The Northern and North Western Railway and the Great Western Railway shipped a quantity of wheat from Hamilton to Kingston, consigned with Molsons Bank, in care of the defendants. The bills of lading contained the following provision:—"All the deficiency in cargo to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 bushels, while the actual quantity shipped was 15,838 bushels. In shipping the wheat it was weighed in drafts of 500 bushels at a time, and by mistake a draft of 500 bushels was omitted in making up the total quantity shipped.

The plaintiff, the carrier, claimed he was entitled to the 500 bushels, being the excess of the quantity mentioned in the bill of lading.

Held, that the plaintiff was not entitled to recover, for that under the circumstances the provision in the bill of lading had not the effect of giving it to him, nor was there any custom proved shewing he was entitled to it.

Mackelcan, Q.C., for the plaintiff.

Bruce, for the defendants.

THE LONDON AND CANADIAN LOAN CO. v. MERRITT ET AL.

Sequestration—When issued—Judgment at Law—Service out of jurisdiction—Chose in action.

Held, that a writ of sequestration cannot issue under the O. J. Act, rule 339, on an ordinary common law judgment for debt recovered before the passing of the Judicature Act, if not being an order for payment of a specific sum, and no day for payment being named in it.

The property attempted to be sequestered was property in the hands of trustees under a will. Two of the trustees, one of whom was the judgment debtor, and took a life interest as part of the property, resided within the jurisdiction; the other trustees resided out of the jurisdiction, namely, in St. Johns, N.B., and the rest of the property was also out of the jurisdiction.

Held, that service of a notice of motion founded on such writ of sequestration on such non-resident trustees was sufficient.

Semble, that under the writ of sequestration a debtor's *choses* in action can be reached.

Arnoldi, for the plaintiffs.

Bain and *W. S. Gordon*, for the defendants.

WHITELY V. MCMAHON.

Arbitration—Costs—Evidence taken in absence of parties.

Under a submission to arbitration certain matters in controversy existing and pending between A. W., J. W. and M. in relation to the amounts due and paid on a certain mortgage made by M. to the T. and L. Co., and as to the proportion of said mortgage paid by the said parties to the Company, were submitted to the arbitrators. The arbitrators made their award by which they found that M. had paid the T. and L. Co. the amount he agreed with A. W. to pay on the mortgage, and had over-paid his proportion by $627, in which sum A. W. was indebted to him; that A. W. should pay that sum to him on or before the 1st of June, 1882, and should also pay the costs of the reference, amounting to $35.

Held, by OSLER, J., that the finding as to costs was an excess of the power of the arbitrators, but that it was severable from the rest of the award; and that the arbitrators in other respects had not exceeded their powers.

Held, however, that the award was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed.

Bethune, Q.C., and *Garrow*, for the applicants.

Shepley, contra.

MACDONALD V. HENWOOD.

Malicious prosecution—Setting criminal law in motion—Trespass—Evidence—New Trial.

Action for malicious prosecution and for trespass. The information which was drawn out by the magistrate on what he said the defendants told him was, that the plaintiff took and carried away a quantity of oats, in which the defendants had a joint interest, without their knowledge or consent, and contrary to their wishes, according to the best of their knowledge and belief. The magistrate, on this information, caused the plaintiff to be arrested and committed to jail to await his trial on this charge The defendants did not tell the magistrate the whole facts, namely:—That the plaintiff had originally been put in possession of the oats under an agreement that he was to thrash them and take the straw in payment, and that, as he contended, he subsequently became the purchaser, and at the time the information was laid was claiming them as such purchaser. Also when the plaintiff was before the magistrate, on his solicitor objecting that no criminal offence was charged, P., one of the defendants, acting for himself as well as for the other defendants, stated that in order to have the charge investigated he would charge the plaintiff with stealing. The magistrate, however, did not appear to have heard this, and did not act upon it. Also, when the plaintiff was put in charge of the constable and committed to jail, the defendants were present. At the trial the plaintiff was non-suited.

A new trial was granted, with leave to the plaintiff to amend his statement of claim—which stated that the defendants had charged the plaintiff with felony—so as to state the true facts, and so as to enable the question to be presented whether on such facts a legal cause of action arose.

The new trial was also granted because there seemed to be evidence to connect the defendants with the trespass.

Pepler, (of Barrie,) for the plaintiff.

Lount, Q.C., for the defendants.

CHANCERY DIVISION.

Wilson, C. J.; Proudfoot, J.] [June 22.

McGEE v. CAMPBELL.

Insolvency—Setting aside final order of discharge—Forum—Parties.

A certain firm having become insolvent, made an assignment under the Insolvent Acts on Sept. 16th, 1878. By a deed of composition and discharge made Oct. 2nd, 1878 the firm covenanted to pay their creditors 10 cents in the dollar, and on Feb. 28th., 1879, the firm applied to the County Court Judge for an order of confirmation thereof. The plaintiff in the present action was one of the creditors of the firm, and he refused to execute or be a party to the said deed; but on persuasion he consented to assign his claim to one Smith, who should hold the same as trustee for the firm, and for the mere purpose of signing the deed. Thus the composition was carried out, and the plaintiff received a certain sum from the firm. Smith gave no consideration for the assignment. The plaintiff afterwards, and long after the confirmation of discharge, discovered that the firm, in the statement of assets and liabilities filed by them with the assignee before the order of discharge, in pursuance of the Insolvent Acts, had failed to disclose certain railway stocks standing in the name of, and owned by the defendant Campbell, a member of the firm; and, also, certain other assets of the defendant Campbell. Thereupon the plaintiff filed this bill, declaring this withholding of assets was fraudulent, and submitting that the deed of composition and discharge was void as against him, and praying a declaration to this effect, and to the effect that he was a creditor of the said firm to the amount of his claim against them.

It appeared on the evidence that some of these railway stocks were obtained by Campbell on a contract that he was to retain one half, if he could give them a marketable value, but if he could not do so within a certain time, the transaction was to be void, and he was to re-transfer.

Held, inasmuch as Campbell had an interest in these shares, which was not merely that of a trustee only, but was a personal interest and property, though contingent on the result of his service, and inasmuch as the contract remained in full force up to the time of the making of the deed of assignment in insolvency, and after it,—although no profit had at that time been actually made on the stock,—the shares should have been returned as part of Campbell's assets, for the language of the statute is large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee.

It also appeared that among the assets which the plaintiff alleged were wrongfully withheld was a certain sum which Campbell had received, or to which he had a claim, from a certain Railway Company as compensation for services rendered as temporary acting President.

Held, the portion of the allowance payable and allowed for services rendered up to the date of the assignment in insolvency, was an asset which Campbell was bound to account for, although the remainder of the said compensation belonged to the insolvent.

Held, also, on the whole case, it appearing the said assets were wrongfully and fraudulently withheld, there was no reason why the insolvency proceedings should not be re-opened and carried on in order to make a due administration of the property, thus withheld; and the final order was impeachable on the grounds stated in the bill.

Held, further, (PROUDFOOT, J., *dubitante*), that the discharge should not be affected further than was absolutely required, and as the property in question which was not returned by the defendant as part of his estate was never entered on the books of the partnership, or treated as partnership property, but was always considered and treated by Campbell as his own private

property the discharge should not be vacated, excepting as to the private estate of Campbell.

Held, further, the assignee in insolvency was not a necessary party to the present suit, which was rightly brought in this Court.

Held, per PROUDFOOT, J., even if the amount received by the plaintiff at the time of the confirmation and discharge, must be taken to have been a compromise of the debt for a valuable consideration, it was sufficient for the plaintiff to show that it was entered into under a mistake caused by the defendants, as to the true amount of the assets, whether the defendants acted innocently or otherwise.

S. H. Blake, Q.C., (*Francis* with him) for the plaintiff.

Maclennan, Q.C., for the defendant Campbell.

D. McCarthy, Q.C., (*Foster* with him) for the defendent Cox.

Rae for the defendant Cassells.

Boyd, C., Ferguson, J.] [June 29.

HARDING V. CARDIFF.

Municipal Act—By-law for opening road—R. S. O. ch. 174, sect. 509.

There is nothing necessarily inconsistent in a plaintiff seeking cumulative relief by attacking a municipal by-law directing the opening of a road across his land, and also the award under it, fixing the amount of compensation to be paid to him.

The by-law impeached was passed on June 22nd, 1878, and was not attacked till this bill was filed on Nov. 20th, 1880. The plaintiff did not maintain that it was void on its face, or *ultra vires*, but he alleged that it was void on account of irregularities in the passing of it, and because it was not under seal, and was not properly registered, and because the defendants had themselves abandoned it. Nevertheless, although aware of its invalidity, the plaintiff, so far from moving against it within the year allowed by the statute, recognized its validity by naming an arbitrator to act for him in assessing compensation.

Held, under these circumstances, on authority of *Vandecar* v. *Oxford*, 3 App. 131, no court had any jurisdiction to interfere therewith, and the by-law became, by effluxion of time, absolute and incontrovertible.

Held, also, although under the Municipal Act such a by-law may not become effectual till it is registered, still that does not prolong the period within which, by the other sections of the statute, it may be quashed.

Held, further, when the by-law directs the opening of a road on a person's land, this in substance imports that the land may be entered upon for the purpose of making the road; and as held in *Stonehouse* v. *Enniskillen*, 32 U. C. R. 567, a municipality may, under R.S.O. ch. 174, sec. 509, enter upon and take or use the land before making compensation.

C. Moss, Q.C. (*Beck* with him) for the plaintiff.

W. Cassels (*Dickson* with him) for the defendant.

Wilson, C. J., Ferguson, J.] [June 29.

CUNNINGHAM V. CANADA SOUTHERN RY.
NORVELL V. CANADA SOUTHERN RY.

Orders of Appellate Courts—Costs.

In each of the above two suits, which were brought to enforce certain awards, the Court of Appeal, on appeal of the plaintiffs, gave judgment in their favour, and also gave each of the plaintiffs his costs.

On appeal to the Supreme Court of Canada, in both suits, that tribunal ordered, in the Cunningham case, a new trial without costs to either party.

Held, the meaning was that the parties should go back to a stage in the cause prior to the appeal to the Court of Appeal, and begin again; that neither party was to have any claim against the other for any costs that had been incurred after that step, and up to the time of the judgment of the Supreme Court; and that in this way the costs of appeal to the Court of Appeal were necessarily taken away.

In the Norvell case, the Supreme Court declared that the award was void, saying nothing about costs.

Held, inasmuch as the award in question was the sole foundation of the plaintiff's suit, and a formal entry of such a judgment would be a dismissal of the bill and a direct reversal of the Court of Appeal; therefore, as a necessary consequence, the plaintiff was deprived of the costs in question.

Held, consequently, as to both suits, the effect

of the judgment of the Supreme Court was to supersede and annul any effect of the orders of the Court of Appeal, or of the certificates of their judgments, or any entries that might have been made of them, or of the orders, making them orders of this Court, and writs of execution issued by the respective plaintiffs therein, after the judgments of the Supreme Court, to enforce payment of the costs of appeal, must be set aside; and it was not necessary to the said plaintiffs to resort to the Supreme Court for relief.

W. Cassels for the plaintiffs in both suits.

Cattanach for the Railway.

NOTE.—The above note is taken from the judgment of Ferguson, J., the judgment of Wilson, C. J., not having yet been handed out, but it was to the same effect.

Boyd, C., Ferguson, J.] [June 29.

RE WOODHALL.

Administration proceedings—Costs.

The costs should not be given out of the estate in administration proceedings, unless it appears that the litigation has been in its origin directed with some show of reason, and a proper foundation for the benefit of the estate, or has in its result conduced to that benefit. Therefore, in this case, where no benefit was shown to anyone by the administration proceedings, as the same result would have been secured without suit, if the plaintiff had not acted so precipitately, and the said proceedings were taken against the will of the adult beneficiaries.

Held, the expense to which the other parties had been put should be paid by the plaintiff, and the order requiring her to pay the costs should be affirmed, according to the rules laid down in *Mackenzie* v. *Taylor*, 7 Beav. 467, as explained in *Hilliard* v. *Fulford*, L. R. 4 Ch. D. 389, and *Rosebatch* v. *Parry*, 27 Gr. 193.

Held, also, following *Farrow* v. *Austin*, L. R. 18 Ch. D. 58, that the question of the residuary legatees' costs is an appealable matter.

Stonehouse for the plaintiff.

J. Hoskin, Q. C., for the infant defendants.

Sheppard for the adult defendants.

Boyd, C.] [June 30.

BELL V. MCDOUGALL.

Insolvency of firm—Surplus after payment in full of partnership creditors.

J. L. McDougall was in business as lumberman and miller, and as such incurred large liabilities. In 1875 he took into partnership D. C. McDougall, who agreed to put in a certain capital. J. L. McDougall's assets were taken over by the partnership, but not his liabilities. In 1877 the firm became insolvent. Bell, the plaintiff, was appointed assignee under the Insolvent Act of 1875. The firm's creditors proved on the estate of the firm, and J. L. McDougall's separate creditors proved on his separate estate. D. C. McDougall had no separate creditors. In 1882 sufficient had been realized out of the partnership assets to pay the partnership creditors in full, and to leave a surplus. D. C. McDougall petitioned the County Judge in insolvency to have the partnership accounts taken, and his share of the surplus paid over to him. Bell, the plaintiff, under instructions from J. L. McDougall's separate creditors, applied for an injunction to restrain D. C. McDougall from proceeding with his petition to the Judge in insolvency, on the grounds (i) that the partnership between him and his brother was fraudulent as against J. L. McDougall's separate creditors, and gave him no right to any share in the surplus; (ii) that the partnership accounts were very intricate, and could not conveniently be taken in the insolvency matter. An injunction was granted *ex parte*. On motion to continue the injunction—

Held, *In re Caton*, 36 C. P. 308, showed that jurisdiction existed in the insolvency court to deal with the claim of the separate creditors of J. L. McDougall as present in this suit, and this being so, under *Close* v. *Mara*, 24 Gr. 593, that was the proper tribunal to deal with the matter, and if any error arose the proper remedy was by appeal The motion to continue the injunction must be refused; should, however, the judge decline for any reason to entertain the matter as set forth by the assignee in the interests of the individual creditors, the application for injunction might be renewed on amended pleadings, if the plaintiff was so advised.

Moss, Q. C., for the plaintiff.

Lash, Q. C., for the defendant.

REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF SIMCOE.

MITCHELL *qui tam* v. PHILLIPS.

Justices of the Peace—Return of conviction—When to be made—33 Vict. c. 27 (I).

Held, that a return by the defendant on the 19th January of a conviction made on the day before the "second Tuesday in the month of December" preceding, was sufficient under the above statute.

[Barrie, ARDAGH, Co. J.

The defendant applied to set aside the judgment by default obtained against him by the plaintiff, and the execution issued thereon, and for an order to stay payment over to the plaintiff of the moneys in the hands of the sheriff.

The facts of this case were not disputed, and may be stated as disclosed by the defendant's affidavit. On Monday, the 12th day of December last, the defendant, who resided at Bondhead, happening to be at Beeton, another village some six miles distant, was applied to for a warrant against this plaintiff for an assault and breach of the peace. He granted the warrant and the same night convicted the plaintiff, the proceedings coming to a close about midnight. Defendant then returned to his home at Bondhead, where he arrived about two o'clock in the morning of Tuesday, the 13th December. The only mail from Bondhead to Barrie, the county town, closed at 6 a.m. No return of this conviction was made by defendant until the 19th of January following. On March 13th the plaintiff commenced this action, endorsing his writ for the penalty of $80.00 prescribed by the statute. No appearance was entered by the defendant; whereupon the plaintiff entered judgment and issued execution in due course. Upon the sheriff's officer's demand under the execution the defendant paid over to him the full amount claimed thereunder. The affidavit of the defendant shews to my mind a sufficient excuse for the delay and neglect on his part; and, that being so, I think I ought, as to this part of his application, to interfere and give him what relief he is entitled to, so long as the money has not reached the plaintiff's hands.

The question then arises, whether upon the facts stated, about which there is no dispute, the defendant has really any defence if allowed to appear.

The action is brought under sect. 3 of 33 Vic c. 27, which, after referring to 32-33 Vic. c. 31, goes on to say, "the returns required by the 76th section of the Act hereinbefore recited shall be made by every Justice of the Peace quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, to the Clerk of the Peace," &c. It is to be observed that sect. 76 of the old Act is not repealed but only amended; this it is important to bear in mind.

If we refer to that Act (32-33 Vict. c. 31), we find sect. 76 enacting that "Every Justice of the Peace shall make return in writing under his hand of all convictions made by him to the next ensuing general or quarterly Sessions of the Peace, or to the next term or sitting of any court having jurisdiction in appeal. . . . at which in either case the appeal can be heard," &c.

The object of this is plain enough; for by reference to section 65 of the same Act, we find the practice in appeal to be: (1) If the conviction was made not less than twelve days before the next sessions, then the appeal was to be to such sessions; (2) If the conviction was made less than twelve days before the next sessions, then the appeal was to the sessions *after* the then next sessions; so that if a conviction were made under that Act within twelve days before any session, no return by the Justice of this conviction was required before the *second* sessions thereafter, inasmuch as there would be no necessity for the return to be made any earlier than that sitting of the Court at which the appeal was to be tried. This section (65) was directly repealed by sect. 1 of 33 Vict. c. 27, which preserves the same distinction as in the old Act, adding, however, a day to the twelve therein mentioned. As far as this case is concerned this alteration in the practice need not be noticed.

We now come to sect. 3 of 33 Vict. c. 27, which amends sect. 76 of 32-33 Vict. c. 31, and we find it begins with a recital as to the necessity for amending the old section: "Whereas in some of the Provinces of Canada the terms or sittings of the General Sessions of the Peace or other Courts to which, under sect. 76 of the said Act, Justices of the Peace are requested to

make returns of convictions had before them, may not be held as often as once in every three months; *and it is desirable that such returns should not be made less frequently.*" This, then, is the purpose of this amendment, to secure returns *quarterly* in every Province instead of *half-yearly* as in some. So that had the conviction taken place on the 13th (*i. e.* the second Tuesday) of December instead of on the 12th of that month, the defendant would be bound to make a return of it "on or before the second Tuesday in March," instead of, as under 32-33 Vict. c. 31, on or before the second Tuesday in June, when the next sittings of the Court at which an appeal might be heard took place. The case of *Corsant, qui tam* v. *Taylor*, 23 U. C. C. P. 607, seems at first sight to be in the plaintiff's favour. The fact there was that the conviction took place on the 21st of January, but no return of it was made before the "second Tuesday in March," as required by the statute. The plaintiff then brought his action alleging the non-return. No *plea* clearly could have helped the defendant; and so as a forlorn hope, it would seem, he demurred to the declaration on the ground that it did not aver that the return of the conviction was not made to the sessions to which a party complaining could by law appeal. The Court above decided against the demurrer—and rightly enough; for independent of the reasons given in the judgment, it was clear that the defendant claimed the right to delay from the 19th of January till the second Tuesday in June following, a period of nearly three months; and this in the face of the recital in sect. 3 of the Act 33 Vict. quoted above: "It is desirable that such returns should not be made less frequently" than once in every three months. Here the defendant sets up no such claim, but he makes his return within three months, and only such a one as was possible—one before the second Tuesday of that one of the four months mentioned in the statute, the earliest before which it was *possible* to make a return.

The intention, as it seems to me, of the Act (33 Vict. c. 27,) was this, (and the wording, I think, may, without wresting the plain meaning, bear the same construction) that in the case of a conviction made within the twelve days immediately preceding either of the semi-annual sittings of the General Sessions, the right given under the Act of 32-33 Vict. ch. 31, to delay making a return of the conviction until the first day of the next sitting of such sessions, that is for a period of over six months, it might be, was taken away and a return ordered to be made on or before the second Tuesday of the third month thereafter, that is on or before the first day of what had been the next sittings of such sessions previous to the Law Reform Act, which made such sittings semi-annual instead of quarterly as theretofore. I have said I think the wording of the section may bear the same construction and I say this looking at the closing words of the section, which are, "and the penalties thereby imposed," (that is by the Act of 32-33 Vict. " . . . shall hereafter apply to the returns hereby required, and to any offence or neglect committed with respect to the making thereof, as if the periods hereby appointed for making the said returns had been mentioned in the said Act instead of the periods thereby appointed for the same." Now let us substitute the periods in the latter Act for those in the prior one. In the older Act there appear to be prescribed *two* periods for making returns, the one, the *first* sittings of the session after the conviction; the other, the *second* sittings after the convictions; and these periods were to be ascertained and determined according as the conviction took place: (1) *Not less* than twelve days before a sittings; (2) *less* than twelve days before a sittings. There were then only semi-annual returns, but the Legislature thought it desirable there should be quarterly returns instead, and so it substitutes *four* periods for the *two* in the former Act; or rather it added two more periods, dove-tailing them in as it were. Had there been no change from quarterly to semi-annual sittings in some of the Provinces, there would have been no need for this section, and it would probably never have been passed, for if returns were actually required and were necessarily made once in every three months, the recital above quoted, that "it is desirable that such returns should not be made less frequently" than once in every three months, would be meaningless. I have said this section *added two more periods*. It says in effect to a justice, "instead of delaying the return of a conviction made by you within the twelve days next preceding any sessions, till the sessions held six months after such (first mentioned) sessions, you must make it within the time you formerly had to make it, that is on the

second Tuesday of the succeeding quarter." The section does not say that every Justice of the Peace shall make his returns quarterly on or before the second Tuesday, etc., but "that *the returns required by the said seventy-sixth section . . . shall be made*," etc.; thus it appears to me, retaining and recognizing some of the conditions and circumstances surrounding and bearing upon the returns mentioned in that seventy-sixth section. Furthermore the new section provides that "every such return shall include all convictions . . . not included in some previous return." Now the form of return prescribed (that in the old Act being still retained) seems to contemplate *monthly* returns, as the heading of it is "Return of convictions made by me in the month of ——— 18—," and the Act says the Justice *shall* make his return "in the following form." Still, as the new section says that returns now shall be quarterly and that every such return shall include all convictions not included in some previous return, it would appear that *one* return for the quarter is sufficient. Is a justice then to wait till the expiration of the last day before the second Tuesday in each of the several months mentioned, before he begins to make up his quarterly return? Under the old Act he had *twelve days* at least to make such return, now he has not as many hours unless he encroaches upon the hours of his natural rest. It seems to me it would be unreasonable to require a Justice of the Peace to delay making up his return till midnight of such a day, which he must do if he wishes to be certain that he will not be called upon to make more than one return, as he is liable at any time of the Monday before such second Tuesday to be called upon to perform magisterial duties.

The question may arise as to what is meant by *making* a return? Does it mean that the return shall be in the hands of the Clerk of the Peace on the second Tuesday, or would it be sufficient if the return should be deposited in one of Her Majesty's post-offices at some hour, even the latest on such Tuesday. If the former, as might reasonably be contended, then it would be requiring an impossibility from this defendant to comply with the statute in this particular case, and the law does not require impossibilities from any man. Looking at the case then in these several aspects, I have come to the conclusion that if any straining of the Act is to be done at all it should be in favour of the defendant, that being the tendency of all recent legislation. And as I cannot, from any of the cases reported, find that this particular point has been settled, I prefer, as far as my light goes, to lean in favour of protecting this defendant against whose *bona fides* in the matter I see no ground for any charge. The judgment and the execution thereon will be set aside, and the money received by the sheriff be paid into Court till further order be made respecting the same, upon payment by the defendant of the costs of entering said judgment, the costs of the execution and sheriff's fees thereon, and the costs of this application, within fifteen days, within which time the defendant is to plead to the action.

MARITIME COURT OF ONTARIO.

(Reported for the LAW JOURNAL.)

THE TUG MAYTHAM.

Suit for wages, part of which accrued more than 90 days before petition filed—Custom of hiring—Covenant by master and part-owner against overdue wages—Meaning of the word seaman—Mode of hiring—Power of Court to deal with mortgages.

This was a proceeding *in rem*, in which Alexander McNabb was petitioner. The answer was filed by D. Moore (mortgagee of the vessel) who intervened. The pleadings were filed in Toronto, and the cause ordered to be heard before the Surrogate Judge of this Court at Collingwood.

ARDAGH, S. J.—The petitioner, Alexander McNabb, claims to be allowed the sum of $300 for 5 months' wages, at $60 a month, up to the 1st September, 1880, and a further sum of $180 as 3 months' wages from 1st July to 1st September 1881. But he admits having received some $45 out of the earnings of the boat, about $25 or $30 of this sum in 1880.

The petitioner's evidence, which was uncontradicted, is that in 1880 his wife, Jane McNabb, and their two sons, John and James, were the owners of this tug, that the two latter hired him as captain or master for $60 a month, to be paid out of the earnings of the boat, that he took charge of her about the 1st April and continued in charge till the 20th August, when she was

burnt. That during the following winter she was repaired, and in the season of 1881, about the 1st of July, he took charge of her again and so continued for 2½ or 3 months, when the respondent took possession of her by virtue of an overdue mortgage, held by him on the tug. On cross-examination the petitioner said, that when his wife and sons bought the tug from the respondent Moore, he helped them a little, but it was his wife's own money that "went into it;" that when he was hired in 1880, nothing was said about the length of time he was hired for; that he could come or go when he liked; that he had always made a bargain *every year* with other boats and for, perhaps, different wages; that every spring they hire their captains and crew, who, when paid off, can go where they like.

The respondent took possession of the vessel under the power in his mortgage,, and after giving the necessary security, sold her, so that this proceeding *in rem* may now be said to be changed into a proceeding *in personam*.

The objection was taken by the respondent that in no case could the petitioner recover wages for 1880, inasmuch as the hiring ended that year, not later than the 1st September, at which date the wages must be said to have accrued. And that, as this petition was not filed till the month of November, 1881, more than the ninety days prescribed by the M. C. Act, 40 Vict. c. 21, s. 2, sub-s. 4, have expired, and that the petitioner cannot enforce this claim against respondent, a *bona fide* mortgagee.

This contention must, I think, be allowed. I should find as a fact that the hiring for 1880 was a separate and independent one from that of 1881, and terminated by the 1st of September in that year; no custom of any sort is proved by which such a hiring could, in these inland waters, where navigation is altogether closed for at least five months of the year, be construed to be a continuous hiring for any longer period than the close of navigation in that year. Indeed, the evidence of the petitioner himself shows the contrary to be the case.

The respondent also filed two mortgages upon the vessel to him. The first dated 18th April, 1881, for the sum of $300, made by Jane McNabb, James McNabb and John McNabb. The second is for the sum of $500, dated the 5th July, 1881, made by Alexander McNabb (this petitioner), and the said James and John McNabb. Both the mortgages contain a covenant in the words following: "We covenant with the said D. Moore, to indemnify and save harmless the said D. Moore, and the said ship, from any lien which might attach to the said ship by reason of overdue wages, or otherwise." The respondent contends that these words "overdue wages," must refer to wages to be earned in the future, and therefore cover the claim of the petitioner for the year 1881's wages, but that if not they must refer to the wages of 1880.

It seems to me that this last is the proper construction to be given to them; and that therefore the petitioner, having given this covenant of indemnity, knowing he had such a claim for 1880 as he now puts forward, should not be heard in support of that claim. Supposing he had as master a right to recover these wages for 1880, the respondent would have the right to fall back on this covenant and recover back from the petitioner the very sum *he* had just recovered from the respondent—such a proceeding as would not be sanctioned by this Court.

To put the opposite construction upon this covenant, and make it applicable to future wages would clash with the well known principle that "no seaman can by agreement forfeit the legal right he has to his wages, and that whether the same be due under special agreement or otherwise." *The Julina*, 2 Dods, 504.

It has been objected that the petitioner is not a "seaman," within the meaning of the Act. This point has already been raised in the case of *The Tug Robb*, 17 C.L.J., 66. McKenzie, J., in that case, says: "It is not necessary to decide here whether the contract specified in the petition should be in writing or not under the Dom. Statutes."

I do not see myself that it is necessary to show that this contract was in writing, or to show anything more than that the petitioner was engaged to do the work he did as master. The Merchants' Shipping Act, 1854, requires the master in hiring seamen, to enter into a written agreement with them. But even if he neglected to do so, would a seaman who went the voyage be thereby debarred from recovering his wages. I see nothing about the mode of hiring the *master* in that Act, but section 191 enacts, that every master of a ship shall have, so far as the case permits, the same rights, rem-

edies and liens for the recovery of his wages, whether by this Act or by any law or custom, any seaman, not being a master, has for the recovery of his wages. As at present advised I must hold this petitioner to have a right to recover here.

A question was raised as to the power of the Court to deal with mortgages. The Vice-Ad. Ct. Act of 1863, confers jurisdiction upon those Courts as to claims in respect of mortgages when the ship has been sold by a decree of the Vice-Ad. Court, and the proceeds are under its control. Our Maritime Court Act gives this Court the same jurisdiction as is conferred upon that Court. But I do not quite see how this question comes in; the mortgagee here merely intervenes, upon the filing of a petition *in rem*, and disputes the petitioner's claim.

Upon the whole case, then, I am of opinion, that there should be a decree in favour of the petitioner for the sum of $160, *i. e.*, the sum of $180, 3 months' wages in 1881, less the sum of $20 received on account, together with his costs of suit.

Gamon and *A. Howell*, for petitioner.

O'Connor, for intervener.

THE TUG MAYTHAM.

Suit for wages, proceeding in rem—Mortgagee intervening—Hiring of petitioner by two only of the three joint-owners, the third being the master of the vessel—Mortgagee not bound by such a hiring if wages excessive.

This was also a proceeding *in rem* against the same vessel as in the last case), in which the petitioner was Walter McNabb, a son of the petitioner in that suit. David Moore, a mortgagee intervened here also, and filed his answer disputing the claim of the petitioner, or at least a portion of it. The claim was for $120, three months' wages from the 1st day of July, 1881, at $40 per month.

ARDAGH, S. J.- The petitioner, who did not appear at the trial, was a young man of 21, who appears to have been hired by James and John McNabb, two of the owners. The first witness called for the petitioner was John McNabb, who produced a small piece of paper, written with pencil, signed by the parties, by which John and James McNabb agreed to give the petitioner, Walter McNabb, the sum of $40 a month. Witness states that petitioner was to do all the work of fireman and deck hand. This witness states that $18 to $20 was the wages usually paid to firemen that season.

One Clark, called by the petitioner, said that what the petitioner did was not worth $40. Captain Alex. Cameron, also called for the petitioner, admitted, in cross examination, that $20 to $25 would be fair wages for what the petitioner did. On the other hand, Fred. Love, engineer on this boat at the same time, was called by the respondent, and said: "Walter McNabb was on board all the time, on and off, as he was wanted. Can't tell what he was worth. He was a smart man. He was worth all that, $40." James Morrow stated that he worked at the same work in 1876, and got only $16 a month, and that wages were then as good as now. One Campbell, part owner of a steam barge, said that firemen were paid $20 a month in October, deck hands $15, $18 and $25. There were one or two other witnesses on either side, but the above ones I consider as giving the most positive evidence.

I am asked to disregard the agreement put in evidence, and the equitable powers of this Court are invoked to prevent the petitioner enforcing what is said to be an unconscionable bargain.

At the hearing I was impressed with the difficulty of getting over a regular written agreement made with the petitioner. On considering the matter, however, I have come to the conclusion that the petitioner as to part of his claim must be postponed to the intervener. The agreement was no doubt made with the petitioner, but with two of the owners only; the third owner, and the one who ought to have had most to say in hiring hands as being the master, not being a party to it. It was expressed to be made on the 1st July, though it appeared in evidence that the petitioner had been working before that time on the vessel. It appears, too, to have been signed by one of the McNabbs at Owen Sound, and by the other at Collingwood. I cannot help saying that looking at the document itself, the manner of the two McNabbs in giving evidence, the absence of the petitioner, and all the attendant facts and circumstances, I have grave doubts as to this agreement having been executed on the day it was said to have been.

I was impressed with the argument that one

man cannot do two men's work ; and some of the witnesses said that what the petitioner did was usually one man's work.

The remarks I have made in the last suit on the subject of mortagages I might refer to here, and inasmuch as this intervener Moore has sold the vessel, subject to the claims of this petitioner and of Alexander McNabb, the purchase money may be said to be in such a position as to be dealt with without this intervener asking a reference. The proper decree, therefore, to be pronounced, would be this : Declare that the petitioner is entitled to be paid the sum of $78 on account of his claim herein, together with the sum of ten dollars as and for his costs, by the said David Moore. Declare that if upon reference to the Deputy Registrar, which the petitioner is hereby allowed to take, it is found that there remains any surplus from the sale of the said vessel after payment of: (1) the judgment of Alexander McNabb, with his taxed costs ; (2) the above mentioned sums of $78 and $10 ; (3) the moneys secured by all the outstanding mortgages made to the said David Moore by any of the said McNabbs, as owners, together with the costs of exercising the powers of sale contained in the said mortgages ; then that there shall be paid to the said petitioner herein, a further sum of $32, together with the residue of his costs of suit beyond the sum of $10 already allowed, or so much of the said surplus as shall be available for such purpose ; any balance to be paid over to the owners at time of sale.

Both these causes might, I think, have been consolidated under rule 265. If it would be of any benefit now to any party, an order for such consolidation would be made if asked for.

Birnie, for petitioner.

O'Connor, for intervener.

ASSESSMENT CASE.

RE CANADA PACIFIC RAILWAY COMPANY.

Assessment of Railway Lands.

On an appeal from the assessment of the property of the Canada Pacific Railway Company at Ottawa, the following judgment was delivered by

DANIELL, CO. J.:—The notice in this matter contains ten grounds of appeal, but most of these being for irregularities which we have the power to amend, it is unnecessary to refer to them in detail. I will therefore deal with the real grounds of complaint, which are as follows:

1st. What portion of the land occupied by the railway should have been assessed as roadway and at the average value of land in the locality as stated upon the assessment roll of the previous year?

2nd. What part of the land other than the roadway should be assessed as lands in the actual occupation of the company?

3rd. What the residue of the company's lands is which should have been assessed as vacant lands not in the actual use of the company?

4th. Whether the buildings upon the land, such as stations, offices and other buildings, should have been included in the value of the lands of the company, or should be excluded on the ground that they are superstructure, as iron rails, fences bridges, etc., are so considered and held to be exempt?

Section 26 of chap. 180 of the Revised Statutes of Ontario is the governing enactment on the subject, and it reads as follows:—"Every railway company shall annually transmit, on or before the 1st day of February, to the clerk of every municipality in which any part of the roadway or other real property of the company is situated, a statement showing :—

1st. The quantity of land occupied by the roadway and the actual value thereof according to the actual value of land in the locality, as stated in the assessment roll of the previous year?

2nd. That real property other than the roadway in actual use and occupation by the company and its value.

3rd. The vacant land not in actual use by the company, and the value thereof as if held for farming or gardening purposes. And the clerk of the municipality shall communicate such statements to the assessor, who shall deliver at or transmit by post to any station or officer of the company, or notice addressed to the company, of the total amount at which he assessed the real property of the company in his municipality or ward, showing the amount for each description of property mentioned in the above statement, and such statement and notice respectively shall be held to be the statement and notice required by the 37th and 41st sections of the Act."

I find the land of the company assessed upon the present roll as follows :—

18 lots, or 2¾ acres, part lot 39, at $700 a lot	$12,500
11½ acres, part lot 39, $2,000 per acre	22,500
2 acres, part lot 39, farm land, at $150	300
Buildings	15,000
Total, all freehold property	$50,300

A plan produced marks the lands owned by the company. The part coloured yellow is called the company "roadway," the balance "unoccupied land." Lines upon the plan show what the assessors call roadway. The assessors assessed roadway 5¼ acres ; lands in actual use and occupation of the company, 6¾ acres, and unoccupied land, 4 acres ; in all 16 acres. It is admitted that all the lands upon the plan, except the portion, 5¼ acres "roadway," extending to Oregon street, was purchased by the company for station grounds.

I have been able to find only three cases in our courts bearing upon the question in dispute. This appears strange, for within the limits of every city and town in Ontario one or other of the railway companies own lands upon which are erected buildings for stations, offices, workshops, etc. How those lands and buildings have for years been assessed, what portion as roadway, and what portion as real property in the actual occupation of the railways, appears to be unknown as far east as Ottawa. I heard in evidence for the first time that three of the county judges in the vicinity of Ottawa rendered judgment in support of the company's contention. The judgments were not reported and are not produced, and I am not therefore aware of the grounds in which those judgments proceeded.

The following are the cases I have been able to find in our report : *Great Western Railway Company* v. *Rouse*, 15 U.C.R. 168—a special case submitted to the Court as follows : "The company being assessed, as they contended improperly, under section 30 of chap. 55, 22 Vict., appealed to the Court of Revision of the Municipal Council, which confirmed the assessment made by the assessor, and from this decision the company appealed to the Judge of the County Court, who, upon hearing the appeal, amended the matter thus :—

Station and Buildings	£1,000
Railway and superstructure	21,000
	£22,000

The first question submitted was "whether the assessment roll (as amended and corrected by the Judge) shows that the company were illegally assessed for superstructure, to which the late Chief Justice Robinson replies, "We find nothing in any statute which relates to the question submitted in this case besides the 21st clause of 16th Vict., chap 182, and it is admitted in the arguments that there is no other enactment on the subject. The language of that clause is too plain to admit of a doubt. The Legislature has expressly directed what is to be assessed, and in respect to the roadway it is the actual value of the land occupied by the road which the assessors are to place upon the roll, and it is in so many words directed that the value shall be estimated accordiug to the average value of land in the locality in which it is located. That excludes superstructure, such as iron, rails, etc." The assessment as to the value of the superstructure upon the "road" was reduced, but the assessment as altered and corrected by the County Judge upon "station and buildings" stood as a correct assessment without alteration by leave of the Chief Justice.

In the *City of Toronto* v. *Great Western Rail. Company*, 25 U.C.R. 570, the assessors assessed certain land of the company upon which there was a large frame building used entirely for railway purposes. Several railway tracks were laid through the building ; the clerks' offices, waiting rooms, freight sheds, baggage rooms were all in the building. The land was assessed at an annual value of $1,200, and the station at $1,500. From this assessment the company appealed to the Court of Revision, who confirmed the assessment, and the company appealed to the County Judge. The County Judge affirmed the assessment, but declared his judgment to be subject to the determination of a superior court. Chief Justice Draper in his judgment says : "As to the question itself, (that is as to whether the building should be assessed with lands), as at present advised, we do not think it would be found to present any great difficulty, and if the city assessors and the Court of Revision had put the two values into one, as forming the whole valuation of the "land," though there might have been an appeal to the County Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how under the statute his decision could have been brought in question." I consider that these two cases go far in deciding that station buildings should be assessed with the lands upon which they are erected, and that the lands on which buildings are erected are not roadways within the meaning of the Assessment Act. *The Great Western Railway Company* v. *Town of Windsor*, 2 U.C.L.J. 193, was an appeal from the Court of Revision to the County Judge who described the land as follows:- "The land once mostly under water, but reclaimed by filling in and grading at great expense, taken by the assessors as land occupied by the road, seems properly so considered, as it really was taken from the main and adjoining tracks, off sets switches and time tables, being fixed machinery and works appurtenant thereto, erections and approaches, without which the railway could not be worked." The judge with the assessors decided the land to be "roadway." The learned judge, I think, properly decided the rails, etc., to be superstructure and exempt, but I am not

prepared to agree with all the learned judge said in reference to the taxation of railway lands. That decision was, moreover, anterior to the other decisions of the Superior Court Judges, and must be held to be overruled so far as it is opposed to them.

I found several cases in our courts in which railways companies have resisted what they considered illegal and improper assessment upon their property, but none raising distinctly the matter in dispute in this appeal. Considering the well known inclination of municipalities to tax everything, and of railway companies to pay as little taxes as possible, I cannot account for the absence of any such case except upon the hypothesis that the foregoing judgments have been accepted as determining beyond doubt the liability of railway buildings to municipal assessment.

Several American cases were cited in the argument by the learned counsel for the company, in which some American courts held railways to be totally exempt from taxation. The examination of these decisions show that they proceeded chiefly on the ground that the provisions of the charters of the railway companies in the states in which the decisions took place contemplated such an exemption, and they do not therefore afford much assistance in the present case, which must be decided on a different principle.

It is a clear principle of law that when an exemption is claimed it must be clearly made out by the party making it. When there is no express provision to the contrary the burden of taxation should fall equally upon the whole rateable property, real and personal, of the municipality. Section 6 of the Assessment Act provides that all land and personal property in this province shall be liable to taxation, subject to certain exemptions therein mentioned, which exemptions make no reference to railway property of any kind.

I am of the opinion that sub-sect. 1 of section 26 of the Assessment Act contains language which imports clearly enough that only the land of the "roadway" or tract on which the rails are laid can be assessed, and that the superstructure, such as rails, bridges, etc., cannot be taken into consideration when determining the value at which the land of the "roadway" ought to be assessed. But sub-section 2, which applies to the assessment of the other real property in the occupation of the railway company, contains no language from which any exemption can be implied. Whilst the first section uses the word "land," and declares that it cannot be rated higher than other land in the locality in which the same was rated during the previous year, the second sub-section uses a different and, in its ordinary signification, a wider term, namely, "real property," and provides that it is to be assessed at its value. Section 2 contains no words restricting the meaning given to the term "real property" by sub-section 7 of section 2 of the Act, which declares that the words "real property" shall include the buildings or other things erected on the land, neither does it contain any words indicating in any way that the "real property" should be rated relatively to any other property or lands in the locality.

It may be remarked, moreover, as important that whilst the former Assessment Act, 16 Vict., chap. 182, sect. 21, provided in one section for the assessment of the land and real property of railways, the present Act contains three sub-sections providing separately for the assessment of the three different kinds of railway property therein specified, with the evident purpose of not only directing a different basis of assessment for each, but also of removing all doubt about the partial exemption given in the first sub-section, not applying to the "real property" referred to in the second sub-section. The transposition in the present Act of the parts of clause 21 of the former Act, and the precision with which these parts are formulated in the three sub-sections of the present Act, clearly point in the same direction. If the land on which stations, offices and storehouses are erected is held to be roadway, and such buildings held to be superstructure and exempt, it would be difficult to imagine what property of railway companies the Legislature intended should be assessed under the head of "real property" mentioned in sub-section 2.

I am, therefore, of opinion that the stations and other buildings of the company must, for the purposes of assessment, be included in determining the value of the land in which they are erected and both assessed together under the head of "real property" in the occupation of the company. I regret having to differ from my brother Judge Ross, who is of opinion that such buildings are not assessable as being part of the superstructure and necessary for the convenient carrying on of the business of the railway. As to the division of the land under the several headings required by the statute, I do not see any difficulty on the evidence. Whether a small portion of the land used for switches, etc., outside of the main track of the railway should be included under the head of "real property in actual use" presents no practical difficulty, as the assessment of it under either head would, according to the evidence, be about the same. As my brother Judge Lyon agrees with me in opinion it will be ordered that the assessment roll shall be amended and altered as follows:—

Roadway, part lot 39, west Broad Street, 5¼ acres	$9,875
Land in actual use and occupation by the railway, 6¾ acres, being part Broad Street west	25,000
Land not in actual use of the railway, 4 acres, part of 39 Broad Street west, being vacant land	600
	$34,975

MISCELLANEOUS.

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CONVEYANCING.

Greenwood's Manual of the Practice of Conveyancing, showing the present practice relating to daily routine of conveyancing in solicitor's offices; to which are added concise forms and precedents in conveyancing. 7th edition. Edited and revised, with special reference to the Conveyancing and Law of Property Act, 1881, by Henry Greenwood. London, 1882.

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A Treatise on the Law and Practice as to Receivers appointed by the High Court of Justice. By W. W. Kerr. 2nd edition. London, 1882.

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A Treatise upon the Employer's Liability Act, 1880. By Alfred Henry Ruegg. London, 1882.

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The Annual Chancery Practice, being a collection of the statutes, orders and rules relating to general practice, procedure and jurisdiction of the Chancery Division of the High Court of Justice and on appeal therefrom to the Court of Appeal, with copious notes, forms, etc. By Thomas Snow and Henry Winstanley. London, 1882.

CORPORATION CASES.

The American Corporation Cases, embracing the decisions of the Supreme Court of the United States and the Courts of Last Resort in the several States since 1st January, 1868. of questions peculiar to the law of Corporations. Edited by Henry Binmore. Vol. V.—Private Corporations. Chicago, 1882.

STATUTE LAW.

Statute Law, The Principles which govern the Construction and Operation of the Statute. By Edward Wilberforce. London, 1881.

PRACTICAL STATUTES.

The Practical Statutes of the Sessions of 1879 and 1881, with introduction, notes, tables of statutes repealed and subject altered, lists of local and personal and private Acts, and a copious index. Edited by W. Paterson. London, 1879—1880.

DIGEST.

The Law Reports under the superintendence and control of the Incorporated Council of Law Reporting for England and Wales. Digest of cases decided by the House of Lords, Privy Council and the Superior Courts of Common Law and Equity, and by the Admiralty and Ecclesiastical Courts and the Courts for Probate, Divorce and Matrimonial Causes, and for Crown cases reserved, and by the Court of Appeal, the several Divisions of the High Court of Justice and the Chief Judge in Bankruptcy, together with a Digest of the important Statutes, from the commencement of Michaelmas Term, 1865, to the end of Trinity Sittings, 1880. Compiled by Martin Ware, John Edward Hall and H. Lacy Fraser.

BOOKS RECEIVED.

A CONCISE TREATISE OF THE LAW OF PROPERTY. By H. W. Boyd Mackay, LL.B. London: H. Sweet, 3 Chancery Lane, 1882. Willing & Williamson.

ESSAYS ON JURISPRUDENCE AND ETHICS. By Frederick Pollock, M.A., LL.D. London: MacMillan & Co., 1882.

THE ADMIRALTY DECISIONS OF SIR WILLIAM YOUNG, KT., LL.B., 1865-1880. Edited by James M. Oxley, LL.B., B.A. Toronto: Carswell & Co., 1882.

A CONCISE TREATISE ON THE PRINCIPLES OF EQUITY PLEADING WITH PRECEDENTS. By Franklin Fiske Heard. Boston: Soule & Bugbee, 1882.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS

Spectators at a prize fight.—*Eng. L. J.*, June 17.

Judgment against a firm.—*Ib.*

The alteration of bank notes.—*Ib.*, July 1.

Boundary—Side of road.—*Albany L. J.*, July 1.

Relinquishment of a parent's right to custody of child to third person.—*Ib.*, July 8, 15.

Dentists.—*Ib.*, July 22.

Profert of the person.—*Central L. J.*, July 7.

Expert testimony in insanity cases.—*Ib.*

Parent and child.—*Ib.*, July 14.

Conduct punishable as contempt of Court.—*Ib.*, July 21.

Equitable mortgage by deposit of title deeds—*Ib.*

Support, lateral (adjacent) and subjacent.—*Am. Law Rev.*, July.

The proximate cause of death in accident insurance policies.—*Ib.*

The doctrine of materiality in the law of perjury.—*Crim. Law Mag.*, July.

Expert testimony—Examination of written documents.—*Am. Law Register*, July.

FLOTSAM AND JETSAM.

The elevation of Mr. Justice Fitzgerald, of the Queen's Bench Division in Ireland, to the peerage as a life-peer and a Lord of Appeal, divides the Lords of Appeal with tolerable fairness between the three kingdoms. England, Ireland and Scotland have now each a Lord of Appeal; although Scotland, not without precedent, has the best of the bargain, as Lord Blackburn may be accounted at least half Scotch. The balance in favour of England is, however, made up by the hereditary law lords.—*Law Journal.*

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

During this term the following gentlemen were called to the Bar, namely :—

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely :—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely :—

Graduates—Archibald Gilchrist Campbell, Alex. W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Reilly. Articled Clerks—E. Considine, D. A. Cameron.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

Canada Law Journal.

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DIARY FOR SEPTEMBER.

7. Sat. Beauharnois, Governor of Canada 1726.
3. Sun. *13th Sunday after Trinity.*
5. Tue. Court of Appeal sittings begin.
10. Sun. *14th Sunday after Trinity.* Sebastopol taken 1855.
12. Tue. County Court sittings for York begin. Peter Russell President 1796.
13. Wed. Frontenac, Governor of Canada 1672. Quebec taken by the British under Wolfe 1759.

TORONTO, SEPT. 1, 1882.

WE publish in another column some portions of the report of the Select Committee of the English House of Commons on the subject of the law of distress. Our extract is taken from the *Times* of July 22nd. We also publish in this number an interesting letter by the well-known writer, Mr. Sheldon Amos, on the bombardment of Alexandria from the point of view of International law. It appeared in the *Times* for July 17th.

WE alluded, supra p. 229, to a case of *Ley* v. *Kidd*, then standing for judgment before the Divisional Court of the Chancery Division, as involving two interesting points, one as to the proper method of pleading title under the Judicature Act, and the other as to the respectivity of R. S. O. c. 109, sec. 2, an enactment also found in the Evidence Act. Judgment, however, has now been given in the case, and it is found to go off on other points, the above two questions remaining untouched.

WE have received from Winnipeg the prospectus of a new legal periodical, which is to be called the *Manitoba Law Journal*, and is designed to furnish a summary of the more important cases arising in the Manitoba Court of Queen's Bench, and to promote the general interests of the profession in that province. The fact that no system of reports as yet exists in that otherwise highly favoured region, is of itself sufficient to justify such an undertaking; but apart from this consideration, we trust that the bar of Manitoba will recognize the great value to them of such a journal, and will duly reward the enterprise of its projectors. One of these, Mr. W. D. Ardagh, was in former years identified with the publication of this journal; and the other, Mr. R. Cassidy, acted for some time as law reporter of the Toronto *Mail*. We wish these gentlemen every success in their undertaking, in which they promise to persevere so long as it pays expenses. We trust that they may not have long to wait until they reap a more substantial harvest from their labours than the realization of such a modest anticipation.

THE United States Supreme Court have given a decision in the case of *Knickerbocker Ins. Co.* v. *Foley*, 13 Law Rep. 577; 11 Fed. R. 766, which at first sight appears a little startling. In taking out a policy of life insurance, the applicant had answered affirmatively the questions—"Are you a man of temperate habits?" "Have you always been so?" The Supreme Court held that this answer was not necessarily untrue, although the jury might find that he had had an attack of *delirium tremens*, resulting from an exceptional indulgence in drink prior to the issuance of the policy; for that his habits, "in the usual, ordinary and every day routine of life," might nevertheless be temperate. It seems going rather far to say that a man who professes to be of temperate habits, in the usual, ordinary and every day routine of life,

may notwithstanding occasionally indulge in an attack of *delirium tremens*. No doubt one swallow does not make a summer, but it takes a good many swallows to give a man *delirium tremens*.

ALLOWANCE OF INTEREST.

[COMMUNICATED]

Interest in general terms is the consideration paid by the borrower to the lender for the use of money, and may arise by express or implied contract, or by operation of law. Usury can only legally exist when the law fixes a rate, and the contract for the rate of interest is greater than that allowed by law. At common law interest may be recovered upon an express promise or where there is an implied promise from the usage of trade or upon mercantile securities. There has long existed a usage to pay interest on the settled balance of merchants' accounts, *Orme* v. *Galloway*, 9 Ex. 544, but this usage is confined to the dealings of merchants with merchants, and no such usage is implied in the dealings of ordinary tradesmen with their customers, nor does any such usage prevail in cases of sales by retail. There is no usage to pay interest upon money lent and payable either on demand or at a stated time, nor upon money received by one for the use of another, nor for work and labor done, nor upon money received by one on deposit; but such a usage is implied when deeds are deposited with bankers to secure a loan, such a transaction being in effect a mortgage upon a loan from bankers upon the security of title-deeds.

Upon mercantile instruments, such as bills of exchange and promissory notes, in the absence of any agreement they bear interest only from their maturity, and upon all instruments bearing interest, in the absence of any agreement to pay interest after they mature, the better opinion now seems to be that a jury may, and the Court ought, to give interest at the same rate as the debt bore before maturity, if it were reasonably within the contemplation of the debtor and creditor that the rate contracted for while the debt was maturing would be the rate after maturity as well. If the rate be a reasonable rate and one ordinarily paid for the use of money, that would appear to be the proper rate; but if on the other hand the rate be excessive and one that no man would voluntarily pay except for a short while and under some pressure, then the Court may infer that the debtor and creditor made no bargain as to the rate after maturity, and the legal rate, six per cent (see C. S. C. cap 58, sec. 8) would then be the proper rate to be allowed; *Keene* v. *Keene*, 3 C. B. N. S. 144; *Simonton* v. *Graham*, 17 Can. L. J. N. S. 169; *Cook* v. *Fowler*, L. R. 7 H. L. 37; *Dalby* v. *Humphreys*, 37 U. C. R. 514.

It has been held that when goods have been sold by an offer in writing, one-third cash and balance by bill at six and twelve months, interest may be collected upon the portion of the purchase money payable in cash from the date of the delivery of the goods if the cash be not paid, *Duncombe* v. *The Brighton Club*, L. R. 10 Q. B. 371; and it was held that it was not necessary that the written offer should state when the cash payment would be payable. It is enough if the demand be of a sum, and at a time, that can be reasonably rendered certain, *Geak* v. *Ross*, 44 L. J. C. P. 317. In the same case it was held not necessary that interest should be demanded in express words if it can be reasonably inferred from the contents of the written demand that the creditor is seeking interest upon the indebtedness due him, and it would seem that if the demand be for interest for the past as well as the future, or for too great a rate, the demand will at all events enable the creditor to claim legal interest from the date of the demand if the debt be then payable. In a recent case Chief Justice Wilson allowed solicitors interest (they having, when rendering their bill, demanded interest), following *Berrington* v. *Phillips*, 1 M. & W. 48. This case seems to be at a variance with *In re*

Smith, 9 Beaven 342, but in principle it would seem that the decision is correct, for it would be hard to point out in what respect a solicitor's bill differs from any other bill, though it might well be that interest should not be allowed till after the expiration of the month succeeding delivery. The client may at any time tax or pay the bill, and if he does not see fit to pay, it is only fair that he should pay interest during the time indulgence is shown.

It may also be here pointed out that if a debt be contracted upon an agreement that it should be arranged by a bill or note, if the debtor neglect or refuse to give the instrument agreed upon, the debt will bear interest from the time such bill or note if given would have enabled the creditor to claim interest, upon the ground that if the debtor had given the note or accepted the bill the debt would at all events from the maturity of the securities bear interest, and the creditor should be in no worse position if he fails to receive the security by the act of the debtor, *Farr* v. *Wald*, 3 M. & W. 25; *Davis* v. *Smith*, 8 M. & W. 399.

An express contract to pay interest may be raised by the conduct of the creditor and debtor when the debtor has been in the habit of paying interest upon obligations from time to time.

The principal statute in force in this Province respecting interest is C. S. U. C., cap 43, ss. 1, 2 and 3, now R. S. O. cap 50, ss. 266 267, 268. By sec. 267 of the Revised Statute, when moneys are payable by virtue of a written instrument at a time certain, a jury may allow interest from the time when such debt became due and payable; and by sub-sec. 2 of the same section, when moneys are payable otherwise than by a written instrument a jury may allow interest from the time when a demand of payment was made in writing informing the debtor of the creditor's intention that interest should be charged from the date of such demand. As has already been intimated, when debts by agreement are payable at a time certain and bear a reasonable interest, that rate will continue to be the rate after maturity of the debt, but in all other cases six per cent is deemed to be the rate of interest when the creditor and debtor have not fixed another rate by an express or implied agreement, or where interest is allowed by operation of law. By sec. 268 of cap. 50 R. S. O., in actions of trover or trespass *de bonis asportatis*, juries may give interest as damages in addition to the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance juries may in like manner allow interest over and above the money recoverable thereon. Also by sec. 269, verdicts in certain cases bear six per cent interest, and in such cases damages are only to be assessed up to the day of the verdict; and again in appeal to the Court of Appeal (sec. 43, R. S. O. cap 38), in any action personal, interest shall be allowed for such time as execution has been delayed by the appeal.

By a salutary doctrine of the Court of Equity, trustees using in trade, or not properly keeping apart the moneys of their *cestui que trust*, may be compelled to account for the same with rests during the time such moneys have remained in their hands, and where profits have arisen from such trading, may also, at the option of the *cestui que trust*, be called upon to account therefor.

RECENT ENGLISH DECISIONS.

Proceeding now to the June numbers of the Law Reports, they consist of 8 Q. B. D. 585—712; 7 P. D. 61—102; 20 Ch. D. 1—229.

GIFT—FIDUCIARY RELATION—PHYSICIAN AND PATIENT.

The first case requiring notice in the first of these, is *Mitchell* v. *Humfray*, p. 587, before the Court of Appeal. In this case the executors of a certain Mrs. Geldard, who died in 1876, strove to recover a sum of £800 from the defendant, who had acted as Mrs. Geldard's medical attendant. The defendant received the money in 1871. The case was

tried before a jury at the Assizes, and the jury then found, in answer to questions put to them, that the advance of the £800 was a gift, and not a loan; that there was no undue influence; that the relation of patient and medical attendant came to an end in 1872, and after that relationship had been ended, and after any effect produced by it had been removed, Mrs. Geldard intentionally abode by what she had done; and that the signature to certain receipts (which the defendant produced, signed by Mrs. Geldard, and which he alleged were for moneys paid by him to her, in accordance with an agreement that he was to pay her an annuity of £40), was not obtained by fraud. The judge entered judgment for the defendant on these findings, and the plaintiff appealed. Counsel for the plaintiff, on this appeal, amongst other things, raised the point that the jury were not asked whether the testatrix had knowledge of her rights, and whether she knew that the gift was impeachable. The Court of Appeal, however, now affirmed the judgment. Lord Selborne, L. C., remarked on the embarrassment caused by the shape in which the case came before the Court, whereby they were limited to a discussion on the findings of the jury, and said: "It ought to have come before us in such a shape that the whole facts should be presented for our consideration and judgment." As to the merits, he said: "No doubt the questions as to the state of the mind of the testatrix were very important; there was no evidence that she actually knew that the gift was impeachable; but she was dead at the time of the trial; and the findings of the jury imply all that ought to be inferred in the defendant's favour; they have found that the relationship of physician and patient had come to an end long before the death of the testatrix, and that she had intentionally abode by what she had done. It must be held that whether she knew or not that she had power to retract the gift, she was determined to abide by her acts; this is not a case of mere acquiescence; she had determined that she would not undo what she had done." It may be added, that this case is contained in the American Law Register for June, p. 871, and in the notes there appended to it, the general subject of gifts between persons standing in confidential relations to each other, is discussed.

FIRE INSURANCE—VENDOR AND PURCHASER—SUBROGATION.

Castellain v. *Preston*, p. 613, is a case which appears to demand very special attention. It arose out of the same contract of insurance as that with which *Rayner* v. *Preston*, L. R. 18 Ch. D. 1—noted 17 C. L. J. 460—was concerned. It may be remembered there was here a contract for the sale of a house, on which a policy of insurance existed. Nothing was said in the contract as to the policy. After the date of the contract, but before the date fixed therein for the completion thereof, the fire took place. In *Rayner* v. *Preston*, the purchaser, having completed his purchase, sought to recover from the vendor money received by him under the above policy of insurance, and the Court of Appeal held that he was not entitled thereto as against the vendor. As, however, is observed by Boyd, C., in *Gill* v. *Canada Fire and Marine Insurance Co.*, not yet reported, but noted supra p. 178, the Lords Justices in *Rayner* v. *Preston* intimated an opinion that the insurance company, who had not, when they paid the amount insured, been informed of the contract of sale, could recover the money from the vendor. In consequence of the doubt thus expressed in *Rayner* v. *Preston*, the insurers now brought the present action of *Castellain* v. *Preston*, seeking to recover the money paid by them on the policy. The company contended that the contract of insurance is merely a contract of indemnity, and unless they recovered in this action the defendants would receive double satisfaction. Chitty, J., however, held that the insurers were not entitled to recover back the insurance money from the vendor, either for their own benefit or as trustees for the purchaser.

He observes, in his judgment, that there was no English authority directly in point, and the question had to be decided on principle; and he also remarks that the circumstance that the insurers were ignorant of the existence of the contract for sale was immaterial; for that it is clear from *Collingridge* v. *Royal Exchange Ass. Co.*, L. R. 8 Q. B. D. 173, the vendors could have recovered notwithstanding the contract for sale. He then examines at length the case of *Darrell* v. *Tibbetts*, L. R. 5 Q. B. D. 560, which was mainly relied on by the plaintiffs. In that case the insurance company had insured a lessor. A fire occurred. After the insurers had paid the lessor for his loss, the tenant repaired, in obedience to a covenant in the lease, whereby he was bound to do so. The Court of Appeal, under these circumstances, held the insurance company were entitled to recover the amount they had paid. Chitty, J., calls marked attention to the fact that there the covenant in the lease, obliging the tenant to repair, was a contract *relating to the loss*, by which the landlord was entitled to receive compensation in damages, and which the insurance company might have called upon him to enforce for their benefit. What was decided in *Darrell* v. *Tibbitts* was that the landlord, having received the benefit of the covenant in the lease, the insurers had a right to treat him as being under an obligation to use it as they might direct. But it is here that *Castellain* v. *Preston* differs; and, indeed, Chitty, J., says the plaintiffs admitted the doctrine of subrogation would not apply here, the contract of sale being independent of the subject matter of the insurance. He says: "It was felt impossible to contend that the insurers, on payment of the loss, were entitled to bring, either in their own names or in the names of the vendors, the defendants, an action to enforce the contract of sale, or even to compel the vendors to complete. The contract of sale was not a contract either directly or indirectly for the preservation of the buildings insured. The contract of insurance was a collateral contract, wholly distinct from and unaffected by the contract of sale." Having thus dealt with the case, so far as the doctrine of subrogation was concerned, the learned judge proceeds to point out that the insurance was one against fire, and it could not be dealt with as though it were an insurance of the solvency of the purchaser; and, therefore, it could not be argued that because the purchase money had been paid, the vendors had in the result suffered no loss, and that for this reason the insurance company could recover back the money paid on the policy. Perhaps the most remarkable feature of the judgment is the distinct approval expressed in it of the decision in the American case of *King* v. *State Mutual Fire Ins. Co.*, 7 Mass. (Cush.) 1. In that case it was decided that where a mortgagee obtained an insurance for himself—the insurance being general upon the property, and not limited in terms to his interest as mortgagee, although his only insurable interest was that of a mortgagee—and a loss by fire occurred before the payment of the debt and the discharge of the mortgage, the mortgagee had a right to recover the amount of the loss for his own use. The result is that if such a mortgagee first recovers the loss from the insurers, and afterwards recovers the full amount of his debt from the mortgagor to his own use, he receives, as it were, a double satisfaction. It is pointed out in *King* v. *State Mutual*, that in such case the mortgagee does not really recover a double satisfaction for one and the same debt, for his contract with the insurers is quite distinct and independent from his contract with the mortgagor; and Chitty, J., in *Castellain* v. *Preston*, adopts and endorses this reasoning. In the United States, however, as appears from an article on the right of insurers to be subrogated and the rights of mortgagees, in the American Law Register for 1879, the view of the law taken in *King* v. *State Mutual* has not been adopted in the majority of the States, neither would it appear to find acceptance in our own courts. In

the latter, as in the majority of the States, the received principle appears to be that where the insurance is taken out by the mortgagee for his own benefit, or by the mortgagor solely for the benefit of the mortgagee (*Westmacott* v. *Hanley*, 22 Gr. 382), there is a right of subrogation on payment of the loss, but where the insurance is taken out by the mortgagor, or by the mortgagee on behalf of the mortgagor, that there is no right of subrogation, unless there be a special subrogation clause in the policy, and the mortgagor be a party thereto. Thus in the very recent case of *Howes* v. *The Dominion Ins. Co.*, before Proudfoot, J., noted supra p. 564, where the policy was taken out by the mortgagee on behalf of the mortgagor, the latter paying the premiums, it was held there was no right of subrogation. For although the policy contained what is called the "subrogation" or "unconditional" clause the mortgagor was not a party thereto. It may be mentioned that there is another case, *Kline* v. *The Union Ins. Co.*, standing for judgment in the Chancery Division, in which the question of subrogation is involved.

CORPORATION—DIRECTORS—RATIFICATION.

York Tramways Co. v. *Willows*, p. 685, seems to be an important case on company law. The defendant strove to escape the payment for some shares in the plaintiffs' company. The two points in the case with which the judgments chiefly deal, may be briefly put thus: (i) The constitution of the company required the business of it to be managed by the board of directors, which board was not to be less than three. It was also provided that any "casual vacancy" in the directorate might be filled up by the board; and that in the event of a "casual vacancy" the continuing board might act. In this case the shares in question were allotted by two directors only; and it was, moreover, a question whether there was a third director in existence, since the man who had been appointed third director had sent in his resignation, which resignation had, by the constitution, to be accepted by the board before taking effect, and which resignation was accepted by the other two existing directors at the very meeting at which they allotted the shares in question to the defendant. Nevertheless, in either view, Lord Coleridge, C. J., and Brett, L. J., agreed in holding that the allotment was valid because it was made by the directors—that is, by a majority. The former says: "If there were three directors, the two acted as a majority of the board. If there were two directors only, the two were acting during a casual vacancy. . . I will consider the contention that the resignation of Fry (the third director) did not create a vacancy until it was accepted. Even according to that view the defendant cannot escape from liability, for the board must act by a majority; and until Fry's resignation was accepted the board did act by a majority, and did by a majority allot these shares to the defendant." Brett, L. J., puts the point very clearly: "If the board consisted of three members, two of them, being a majority, might act; for the articles of association direct that the board shall consist of not less than three directors, and that the business of the company shall be transacted by the board, and I think it sufficient that the majority acted. Then Fry's resignation created a casual vacancy within the meaning of the 72nd article, and it was lawful for the continuing board to act until the proper number of the board should be filled up. This circumstance makes a difference between the present case and all the others cited before us, in which the powers of boards of directors have been discussed." The third L. J. (Sir John Holker) however, though he agreed in the final result on other grounds, viz., that the defendant must pay for the shares, yet dissented as to the above matter. He said, as to this: "It is said that when the board consists of three members, it is sufficient if the majority act on behalf of the board. In my opinion the better view is that the

articles of association direct that the business of the company shall be managed by not less than three directors, and that the shares must not be allotted by less than three. I think the business of the company cannot be said to be managed by the minimum number allowed by the articles, when one person is absent; it would not then be a board of three." (ii) The second phase of the case was as follows. At the same meeting at which the two directors allotted the shares in question, they also elected the defendant a director, under the provision in the constitution, that any casual vacancy occurring in the board might be filled up by the board. Having been so elected a director, the defendant attended a meeting subsequently held; he then confirmed the allotment to himself, he concurred in an order made upon the company's bankers, and agreed to a certain mode of raising money for the company's benefit. The defendant, therefore, acted as a director, and joined in these proceedings as a member of the board. Then, after doing so, he withdrew his application for shares, and refused to pay the amount of the call made in respect of them. The question, therefore, was whether he was estopped from denying his liability in the shares by having acted as director. The L. J. J. unanimously held that he was, even if it could be contended that under the plaintiffs' constitution the defendant was not duly qualified to act as director. Brett, L.J., says: "I will assume that the defendant was not qualified to be a director. . . Nevertheless he acted as a director, and did so *bona fide* and with the intention of discharging the duties of director. . . I think that the defendant was bound by his acting as a director; in this point of view also it must be taken that he joined in the allotment to himself, and I think that he is estopped from denying his liability."

FRAUDULENT SOLICITOR—LARCENY ACT—DOM. 32-33 V., C. 21, S. 77.

The last case in this number of the Q.B.D. is *Reg.* v. *Newman*, p. 706, where the question was whether a solicitor who had been entrusted by a client with money to invest on mortgage, and who fraudulently appropriates it to his own use, is to be considered to have been entrusted "with the property of any other person for safe custody," within Imp. 24-25 Vict. c. 96, s. 76 (the Larceny Act), which corresponds to Dom. 32-33 Vict. c. 21, s. 77. The court for Crown Cases Reserved held that he was not. Stephen, J., says: "If money is entrusted to an agent on the terms that he is to keep it by him and then to lay it out on mortgage, I should say that is an entrusting for safe custody within s. 76 (Dom. s. 77); for this, *Reg.* v *Fullagar*, 41 L. T. (N. S.) 448, appears to me a direct authority. In the present case we are not informed whether money in any specific form was intrusted, nor whether there were any specific directions as to the keeping of it, or whether it was simply paid by cheque, with possibly a current debtor and creditor account; if the latter were the true state of things, there could clearly be no offence within s. 76 (Dom. s. 77). Again, there is no evidence of what was to be done with the money in the interval between the intrusting and the investment; therefore, it is impossible to conclude that it was intrusted for safe custody during that interval."

Of the June number of the Law Reports, the cases in 7 P. D. 61—102, and in 20 Ch. D. 1—229, still remain for consideration.

A. H. F. L.

SELECTIONS.

INTERNATIONAL LAW AND THE BOMBARDMENT OF ALEXANDRIA.

The annexed letter from a leading authority on the subject of international law, will be found interesting by our readers. It appeared in the *Times* for July 17th:

To the Editor of the "Times."

SIR,—While I cordially acquiesce in the argument of your leading article of to-day, that international law has to be ever reforged, in accord-

ance with its native spirit, out of new facts as they continuously present themselves, I also think the legal justification of the recent bombardment is nearer at hand than this.

In the cases of the treaty for the pacification of Greece, concluded on the 6th of July, 1827; of the quadruple alliance of 1834 between France, Great Britain, Spain, and Portugal, for "establishing internal peace throughout the Peninsula;" and in the cases of the repeated utterances of the President of the United States as to possible intervention in Cuba in order to put an end to the "deplorable strife of parties,"(see message to Congress, December 7th, 1874), the principle of limited and temporary hostilities for the mere sake of humanity, as well as for the protection of outside interests, was abundantly recognized and nowhere disputed. The main factor in the present problem on which adverse advocates could rely is that the insurrectionary and anarchical forces had not had time enough to manifest their inherent strength, if they had such strength. But against all this there is to be put the enormous purely Egyptian interests jeopardized—to an extent wholly out of proportion to those suggested by earlier precedents—by every day's delay, and the probability of a recurrence of an organized butchery by soldiers of the revolutionary faction, such as that of the 11th of June. The advent of the fleet, the bombardment, and, as we may hope, the effectual and lasting pacification of the country are a series of consequences demanded by the supreme interests of humanity—the one consideration to which international law, even when most technical in its rules, has always subordinated every other.

The doctrine of restricted hostilities is a time-honoured one in international law, especially in the defensive matters of "embargo," "reprisals," and "retortions," as I have fully explained in the notes to my edition of Manning's "Law of Nations," p. 142. The recent history of the doctrine may be illustrated by that of the closely analogous doctrine of restricted neutrality. This latter doctrine was developed, but not created, by the recognition of the Confederates in the Secession war as *de facto* belligerents. The legal grounds and extent of this recognition are fully explained in a learned note by the late Mr. Dana in his edition of Wheaton. Similarly the doctrine of limited hostility will be developed and elucidated, but not created, by the recent practical application of it at Alexandria.

I am, Sir, your obedient servant,

July 15. SHELDON AMOS.

THE LAW OF DISTRESS

The report has been printed of the Select Committee of the House of Commons appointed to consider "the whole subject of the law of distress, especially as regards agricultural landlords and tenants." After an historical sketch of the law, together with a review of the evidence taken by them and of the arguments for and against the law, the Committee (of which Mr. Goschen was chairman) proceed as follows:—

"Most of the witnesses who expressed themselves in favour of a retention of the law, at the same time advocated considerable modifications in its provisions. Those that desired the total abolition of the law were of opinion that cheaper and more speedy means of re-entry, in the event of non-payment of rent, must be given to the landlord.

"In the opinion of your Committee, a period of commercial and agricultural depression would be very inopportune for the abolition of the law of distress, which would of necessity impair the existing system of credit given by the landlord to the tenant, and cause serious inconvenience.

"There are some special enactments relating to exemptions that require notice. The Lodger Act of 1871 protects goods that are not the property of the tenant; workmen's tools are exempt from seizure; looms and frames used by workmen at their homes are not liable for the rental of those homes. Goods sent to the house for the purposes of trade, as, for instance, a watch for repair, are not endangered by the law of distress. Beasts at the plough are excepted, unless there are not sufficient goods otherwise to distrain upon; and there are some other exemptions.

"The tithe owners can distrain for two years only. Under the Bankruptcy Law the landlord has the privilege of preference with regard to one year's rent only. Upon a careful review of the evidence placed before them, your Committee are of opinion that a law of distress should be retained. The evidence seems to them to favour modification rather than abolition of the law.

"Your Committee recommend the following alterations in the law:—

"That the right of distraint be restricted to one year's rent, and that this right should only be exercised within six months after the said year's rent has become due.

"That with regard to agisted stock, the limit of distress should be the consideration payable for the grazing to the farmer who takes in the stock, in accordance with section 5 of 30 and 31 Vict. cap. 42.

"That provision be made for the protection of machinery not the property of the tenant; also that animals not the property of the tenant, temporarily upon the holding for breeding purposes, be exempt.

"That the limit of £20 distress, regulated by the Act of 1817, 57 Geo. III., cap. 93, be raised to £50, and that the allowance in the schedule of that Act for a man in possession be raised from 2s. 6d. to 5s. a day.

"That, the attention of your Committee having been called to the heavy and unnecessary costs incident to the processes of distress and the sale of effects, the costs and charges relative to distress for rent in cases above the limit regulated by the Act should be subject to taxation by the Registrar of the County Court or other proper officer.

"That the time a bailiff may remain in possession under a distress may, at the request of the tenant and on his giving security for the costs, be increased from five to fifteen days, and that in such case no sale shall take place sooner, except at the request or with the consent of the tenant; also, that at the desire of the landlord, or of the tenant, the goods of the tenant may be removed for sale to public auction rooms or some other fit place.

"That appraisement previous to sale may be omitted, and that bailiffs should be approved by the County Court Judge of the district in which they act, and be subject to removal by him for extortion or misconduct.

"Your Committee are of opinion that, so far as possible, the above recommendations should be embodied in a Bill and laid before Parliament."—*Times*.

RECTIFYING MISTAKES IN WILLS.

The case of *Morrell* v. *Morrell* is of importance, as showing how mistakes occasionally creep into a will, and interesting as an example of the refined distinctions to be found in the law on the subject. The broad result of the case is, that a will by which on the face of it the testator disposed of forty shares in a company was admitted to probate with the word 'forty' omitted wherever it occurred, with the effect of disposing of four hundred shares, being all which the testator had. The decision barely stated is likely to produce some surprise. A will which is not ambiguous in any sense, but which in the clearest words bequeaths one thing has been made to bequeath another. The word 'forty' is held to have found its way into the will by mistake; and although it has all the sanction of the signature of the testator and of the attestation of the witnesses, it has been disregarded. On the other hand, it was clear that the testator meant to deal with all his shares, amounting to 400, and his instructions to his solicitor were express on this head. Sympathy is all on the side of the decision; so that, if the omission of the word 'forty' can be reconciled with general legal principles, the lawyer will have a leaning to adopt that course.

John Morrell, the testator, was a Liverpool provision merchant, who had converted his business into a limited company, of which he was the chairman, and in which his four nephews, who had before taken part in the business, were employed. He had 400 'B shares,' fully paid up, and, in instructing Mr. William Alfred Jevons, his solicitor, to prepare his will, he directed that all his B. shares should be given to his four nephews. A draft was prepared in which the words 'all my B. shares' were used in dealing with the shares bequeathed to the nephews. The draft was sent to London to be settled by counsel. The counsel, it is stated, 'inadvertently' inserted the word 'forty' after 'my,' so that the bequest was of 'all my forty shares.' The counsel does not appear to have been called as a witness, and it is difficult to see how he could have put in the word 'forty' by inadvertence. Why 'forty,' of all numbers in arithmetic? In all probability he knew from some source the number of the shares belonging to the testator and confused forty with four hundred. It is remarkable that this matter was not more fully investigated, as, in Sir James Hannen's opinion, much turned upon it. When the will was engrossed for execution Mr. Jevons read it, and noticed the word 'forty;' but it did not occur to him that the insertion was material. Whether he knew the number of the testator's shares does not appear; but he probably did. When the will was executed, it was not wholly read over to the testator. In summing up to the jury Sir James Hannen told them in effect that if words were left out, there was plainly no remedy, and if words were put in by fraud they could plainly be discarded; but the case in which one man employs another to make his will for him, and that person inserts a word by mistake, was intermediate. The main question left to the jury was whether the mistake consisted in putting in the 'forty' or in omitting the 'four hundred,' the judge plainly intimating his opinion that in the latter case the accident could not be cured. The jury in result found that the words 'forty' repeated several times were inserted by mistake; that the mistake consisted in the insertion of the words; that the testator did not know of the insertion of the words; that the will was not read over to him; and, lastly, that he meant his nephews to have all the shares. This last finding was immaterial, as the question was one of form and not of intent, and the learned judge took time to consider his judgment, as it was sup-

posed that a similar case was pending in the Privy Council. Eventually he ordered the will to be admitted to probate with the omission of the word 'forty' wherever inserted. Sir James Hannen does not appear to have had any hesitation as to the right course to pursue. He said that the verdict of the jury had disposed of the whole matter, and referred to the case of *Fulton* v. *Andrew*, 44 Law J. Rep. P. & M. 17, in the House of Lords as an authority. This case cannot, however, be said to settle the law on the subject satisfactorily. It is true the learned lords were of opinion that a certain residuary clause might be omitted from the probate; but their arguments are mainly addressed to some imperfections in the form of proceeding. It is possible that Sir James Hannen thought it best not to attempt to generalize. The subject is one which it is difficult to put in comprehensive language, and which, when so put, is very apt to mislead. At the same time, when all the facts are ascertained by a verdict, it is not very difficult to say on which side of the line the case falls. In this instance the rejection of the words in question seems to have been rightly allowed.

The matter is apt to be a little confused by the fact that a solicitor and counsel were employed to make the will. For any mistake made by them in their art or mode of carrying his intention into legal effect, the testator would, doubtless, be held responsible himself; but in regard to the word 'forty,' they were only in the position of amanuenses? They had no authority to insert the word 'forty' in the will at all. Suppose the testator had dictated his will to his valet, and this worthy, believing he knew the number of shares belonging to his master, wrote 'all my forty shares,' when the testator said, 'all my shares,' would the fact that the testator signed the document without reading it, bring about a result which was very far from the testator's intentions? Suppose the converse case, that the testator dictated 'forty of my shares,' and the amanuensis wrote, through carelessness, 'my shares,' the forty, although it can be abstracted from the will, cannot be inserted. Nothing but the attested signature of the testator can make a word part of a will, but the proof that a word was inserted by mistake may take it out of a will. In other words, the Probate Court cannot make a man's will for him, but it can prevent anything that is not really part of a man's will being given to the world as his, if that part can be severed from the rest. It may be said that in reality it is making a will to abstract words from the signed document, and so it is in a certain sense. The distinction stated in its result is a fine one, but it arises from a conflict between the duty of the Court to allow only a man's true will to be proved and the requirements of the law that certain formalities shall be regarded. Even when these formalities have been duly performed, the Court will sometimes disregard that which has obtained their sanction, but it cannot in any case dispense with those formalities. It can clear a duly executed will of foreign matter which should not be there, but it cannot introduce matter which should be there, when such matter has not had the sanction of due execution. *Law Journal.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

JUNE 30.

THE GRAND JUNCTION RAILWAY CO. V. THE MIDLAND RAILWAY CO.

Railway Company—Right to land—Forfeiture of—Description of Company.

The Peterborough and Chemong Lake Railway Company, which was incorporated in 1855 (18 Vict., ch 194), had acquired the land in question as part of their road-bed, and the charter of that company expired in 1865 by reason of the road not having been put into operation, and in 1866 an Act was passed (29 and 30 Vict, ch. 98) by which the road was to be sold at auction; the Act of incorporation revived, and the time extended five years for completing the road. Within that period a conveyance was made to the defendant company, who took possession, but did not make any use of the land until shortly before the institution of proceedings in this suit. In 1872 the Cobourg, Peterborough and Marmora Railway and Mining Company filed a map and book of reference for proposed extension of their line of road over the land in question, and constructed a part of it thereon, but ceased in 1873. In 1880 the C. P. & M. R. & M. Co. leased to the plaintiff com-

pany these same lands, and the present proceedings were instituted to obtain possession.

Held, [affirming the judgment of the Court below] that the partial construction of the road by the C. P. & M. M. & R. Co. in 1872 was an act of trespass; that the defendant company, under the reviving Act and the conveyance in pursuance thereof, acquired a title to the land; that the authority to sell by the order of the Court of Chancery was permission only; that their right to the land was not forfeited by non-completion of the work within the five years; and therefore that the plaintiff company could not succeed.

The deed to the defendant company described it by its original name, which in fact had been changed.

Held, a sufficient *descriptio personæ* to enable the company to take, though it might not be sufficient to sue in.

H. Cameron, Q.C., and *Moss*, Q.C., for the appellants.

E. Blake, Q.C., and *W. Cassels*, contra.

CHAPMAN v. ROGERS.

Promissory note—Equities attaching to—Partnership—Satisfaction.

T. was carrying on business with others under the name of W. R. R. & Co., and having discovered that one of the firm (R.) was improperly making use of the name of the firm, dissolved the partnership, and thereupon entered into an agreement with R. that he should take all R's effects, including his interest in the said firm; and in consideration thereof T. covenanted to pay all debts due by the firm, including all the obligations that R. had created in the name of the firm, rightly or not; also certain debts of R.'s set forth in a schedule. Two notes made by the plaintiff for R.'s accommodation, and indorsed by him in the name of the firm, were held by a bank where they had been discounted, all of which circumstances T. was fully aware of, and with that knowledge he retired the notes at maturity.

Held, affirming the judgment of the Court below [BURTON, J. A., dissenting] that the payment must be considered as satisfaction within the meaning of the agreement, and that T. when he received the notes took them subject to all equities attaching as accommodation notes, and consequently T. could not enforce payment of them from the plaintiff.

Bethune, Q.C., and *Walkem*, Q.C., for the appellants.

Britton, Q.C., *Black*, and *Machar*, contra.

JELLETT v. ANDERSON.

Disturbance of ferry—Construction of—License to ferry.

Held, affirming the decree of the Court of Chancery as reported in 27 Gr. 411, that the plaintiff was entitled to restrain the defendant from disturbing him in the exercise of his franchise, [HAGARTY, C. J., dissenting].

Bethune, Q.C., and *Moss*, Q.C., for appellant.

Robinson, Q.C., and *J. K. Kerr*, Q.C., contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

ORMEROD v. TODMERDEN JOINT STOCK MILL CO.

Imp. Jud. Act 1873, sec. 57—Ont. J. A., sec. 48—Compulsory reference—Appeal from judicial discretion.

The Court of Appeal has jurisdiction to review an order made by a Judge under the above section referring to a referee, as therein mentioned, any question or issue of fact—(Lord COLERIDGE, C. J., *dubitante.*)

Per BRETT, L. J.—"Prolonged examination of documents" means of such documents as it is necessary to enquire into in order to enable the Judge to leave questions of *fact* to a jury.

April 3, C. A—L. R. 8 Q. B. D. 664.

The principal question before the Court was whether or not there is an appeal against an order of a Judge ordering the mode of trial referred to in the above head-note. The order in question was made by Mr. Baron Pollock.

BRETT, L. J.—The first and most important question which I will consider is whether, assuming the conditions named in the 57th section (Ont. sec. 48) to have existed, this Court has jurisdiction to review the discretion of the learned Judge in such a case. I am of opinion that the Court has that jurisdiction. . . It is said that we (the Court) have not, because sec. 57 states the existence of these conditions precedent, which it goes on to say, "cannot, in the opinion of a Court or a Judge, conveniently be

made before a jury," and it is said that if the Judge has that opinion then we cannot say that it appears he has not that opinion, and therefore from the nature of the thing there is no appeal. I cannot give that force to the phrase I have just referred to. The words "in the opinion of the Court or a Judge" seem to me to be equivalent to "according to the judgment of the Court or a Judge," and inasmuch as there cannot be any positive rule of law applicable to the particular case, for that reason it is that this opinion is an opinion of discretion as distinguished from an absolute rule of law.

HOLKER, L. J.—After a reference to the sections of the Judicature Act and to the orders, I have now come to the conclusion that it was the intention of the legislature to give, and that the legislature has given, an appeal from the exercise of the discretion of a learned Judge who either makes or refuses an order for an alteration in the mode of trial. By giving an appeal I do not mean that the legislature has enacted that there should be an appeal in the strict sense of the word, but where a learned Judge has, in making such an order, not exercised his discretion properly, that there the Court of Appeal should exercise its discretion in lieu of the discretion of the learned Judge.

LORD COLERIDGE, C. J.—Although I certainly should not have made the order myself, I must decline to interfere with it when made, on two grounds: First—I think Mr. Baron Pollock had jurisdiction to make the order, and that we ought not to interfere with his discretion. Secondly—I am by no means satisfied that we have jurisdiction to review this particular kind of order, and if it were necessary, and I think it is not, to decide the case on this ground, I am prepared, as at present advised, to hold that we have not.

BRETT, L. J.—The only power given to the Court or a Judge under this section is to order that the issues of fact shall be referred. There is no power to refer issues of law; and I am very much inclined to think that the prolonged examination of documents, which is intended in this section, is a prolonged examination of such documents as it is necessary to enquire into in order to enable the Judge to leave the questions of fact, and where the examination is not so required, but only to enable the Judge to determine a question of legal right, I doubt very much whether it is an examination within this section.

[NOTE.—*The Imp. and Ont. sections appear to be virtually identical. The general subject of appeal from the discretion of a Judge is discussed in the judgments, which are of considerable length.*]

ONTARIO.

ELECTION CASE.

IN THE MATTER OF RECOUNT—ELECTORAL DISTRICT OF MUSKOKA AND PARRY SOUND ELECTION (DOMINION).

Recount by County Judge—Dominion Elections Acts of 1874 and 1878 (consolidated), ss. 55, 67 —Effect of irregular acts or omissions by D. R. O.—Written ballots.

Held, that irregular acts or omissions by a deputy returning officer in dealing with a ballot before or after it has been cast by a voter do not warrant its disallowance for the candidate indicated by the voter.

Where there appeared, along with the ordinary printed forms of ballots, certain written ballots, giving little more than the names of the candidates, but apparently supplied by the D. R. O.'s and counted by them; *held*, that, on a recount, the County Judge was not justified in rejecting the written ballots.

[July 24, GOWAN, Co. J.

We give below the interesting judgment delivered by Judge Gowan in connection with the recount of votes in the recent Muskoka election, the result of which left Mr. O'Brien still in a majority of three over his opponent, Mr. Miller. The facts of the case sufficiently appear from the judgment.

Pepler, for Mr. O'Brien.

Lash, Q.C., for Mr. Miller.

GOWAN, Co. J.—In the course of this recount a large number of ballots cast were objected to by counsel for the candidates respectively, because Deputy Returning Officers in dealing with these ballots did something not in accordance with the direction of the Election Act, or omitted doing something directed by that Act, as an inspection of the ballots cast, it is contended, shows. It is urged that these ballots should now be disallowed, though counted and allowed for the candidates for whom they were given. In the view I take I need not enter on the details of these objections. But there is one class

of these ballots unique and exceptional—written, not printed ballots, giving little more than the names of the candidates—which appeared with the ordinary printed form of ballots in two divisions, and all these Mr. Lash, on behalf of Mr. Miller, urges should be struck out as entirely void—not being ballots at all—wanting in the full name of candidates and in other particulars set forth in the nomination paper. It is urged that the objection goes to the very essence of the requirements of the Act, that the use of such ballots would militate against the chief object of the ballot system, secresy in vote—would be dangerous as giving facilities for fraud in voting, and that the Act is imperative, making a certain paper a ballot and nothing else—imperative in respect to the voter as well as officers. I am pointed to the various sections in the Election Act showing the particular kind of ballot required to be used, and I am referred to a case going to show that an omission in an Act cannot be supplied. The fact of provision being made that the deputy may supply a ballot box, and no provision being made for supplying ballots not supplied by the R. O., is urged as showing clearly the utter absence of power in the D. R. O. to supply them upon the well known axiom of interpretation, *expressio unius*, etc. I have had the experience of three previous recounts with the assistance of able counsel, and had formed and acted upon a judgment not in accordance with the view urged upon the point first referred to, but I was desirous also to hear Mr. Lash and Mr. Pepler, in order that I might have all the assistance I could towards reaching a right conclusion on the matter now before me, and the second point Mr. Lash takes is the first of the kind I have been required to deal with. I have now had the benefit of having both points very ably argued, and it is thought convenient that I should pass upon these two general objections before taking up the other ballots which have for the most part little in common and involve a separate examination and decision upon each. Indeed, if I arrived at the conclusion that Mr. Lash contends for, the matter of these ballots would practically be of minor importance, for one candidate or the other would have a decided majority by striking out all the ballots coming within the general objection referred to. I desire to say a few words which I have hastily thrown together since the afternoon adjournment, for my first opinion has not been shaken; I am unable to come to the view Mr. Lash contends for. In examining the provisions of sect. 67 of the Election Act the first consideration that occurred to me was the object and purpose of the enactment—what was in contemplation in engrafting it upon the Election laws. The duty assigned to the judge seems to me to be of a very humble character, and especially limited and restrained. In examining the machinery for carrying out the vote by ballot, it is obvious enough that a great number of agents would necessarily be employed in the several electoral districts (42 D. R. O.'s in this district), and that many of them would probably be of limited education, certainly not accustomed to the work, of varied intelligence, and some possibly not without prejudice; in any case uniformity of decision could scarcely be expected from a number of men of ordinary ability, acting singly, in dealing with the variety of questions which might and probably would arise in reference to the marking of ballots—one rule might be applied by one D. R. O. and another by another elsewhere in the same electoral district. This, I think, the Legislature must have had in view, and as some corrective to the possible evil, deemed it essential that in respect to each particular election at least there should be some method by which a uniform rule, so far as possible, should be applied to all the ballots cast in every division of the same electoral district, and so certain judges conveniently resident were empowered to recount—one mind in place of each and all of the D. R. O.'s. Again, one can understand that in the hurry and possible excitement of dealing with and distributing a number of ballot papers, a mistake in numbers might easily be made, and that from pure inadvertence the ballot account or statement and the ballots cast might not agree, or wilful misrepresentation might occur. The returning officer would only have the statements to go upon and could not test their accuracy; this consideration may also have operated with Parliament in providing for an inspection of the ballots actually cast and a summing up of the vote in presence of parties interested, and with appropriate provision for the safe keeping of the ballots. Another reason may have prevailed. It is noticeable that not merely the parcels containing used and rejected ballots are to be opened, but the spoiled ballots as well, and I strongly incline to think it may

have been in the mind of the Legislature to enable a full inspection to be made under the supervision of an agent of the law whose position and habitual engagements would give assurance that the ballots would be carefully guarded and preserved in the condition in which they came; that is, an inspection that those interested might think it expedient to make in view of the ulterior proceedings to question an election return on petition. However that may be, there is the enactment, and I repeat that in my judgment the duty assigned to the judge is of a very humble character. The judge's authority is special—to act in the matter of the recount—the particular agent is designated by his name of office. He has no office in the matter, no general authority accrues to him; such as he has arises only from the mandate in the statute and to the extent set down A mere statutory agent, he acts as and within the limits pointed out. If it had been intended to give anything like a general authority to deal with the matter so as to accomplish complete justice or reach the very truth of the matter, the judge would have received power for examination into the facts involved, to secure and receive evidence necessary to a complete enquiry, and all the papers connected with the election would have been ordered to be produced before him. As it is he is simply to recount upon the material required to be laid before him, and the only material is the ballots used as contained in the parcels returned by the D. R. O. This is the sole material, in the shape of evidence, upon which the judge can act, and he is directed to recount the ballots and VERIFY—prove to be true—or CORRECT—make right—the ballot paper account.

In this recount he is limited and restrained by the rules in sec. 55, he has only the intrinsic evidence furnished by the ballots themselves, and he must form his judgment by simple inspection of the only material the statute has provided in the way of evidence. I believe this to be the proper view to take of the enactment. I feel that as a mere statutory agent I must keep strictly within the limits assigned to me. I have said the parcels of ballots are the sole material upon which the Judge can act—the only evidence before him. The 67 sec. after providing for the appointing of time and place for a recount of votes by the Judge and notice thereof to the candidates, directs that the Judge shall command the R. O. and election clerk to attend at the time and place appointed with the parcels containing the ballots used at the election, which command the R. O. and his election clerk shall obey. The "parcels." What are these parcels? It is argued that the clause in certain instructions to Returning Officers concerning the direction to their deputies to enclose the ballots, voters' list and other documents to form one parcel, shows that all the papers are put together in this parcel, and that it is the parcel to be brought before the County Judge. How can I look at any instructions to R. O. not properly before me? But even if I could I do not see how instructions subsequently framed could give any clue to the interpretation of the terms used in the Act. Looking at sec. 55, we see that the D. R. O. after making his count, shall put into "separate envelopes or parcels" all the ballot papers—those given for each candidate, those rejected, and all being endorsed to indicate their contents, and to put them in the ballot box. In sec. 57, he is directed to make out a statement of results, and enclose such statement in the ballot box, together with other election papers. These are all open and for use by R. O's. The four envelopes or parcels containing the ballots alone are sealed and these the R. O. is not to open. The R. O., having received all the ballot boxes, opens them, and from the statements contained sums up the votes. That the parcels containing the ballots only are the parcels referred to in sec. 67 seems to me most obvious. The R. O., whose summing up is challenged—if the question was one of mere "summing up"—must, of necessity, produce the material upon which his summing up was made. It is not of necessity in case of recount that the statements should be under the Judge's eyes. I think he could open the ballot parcels if they were not. But however that may be, although not required in express words to produce it the R. O. is required to be present and with his election clerk, and for what purpose I know not, if it is not for exhibiting the statements on which he acted. The things to be proved true or corrected are these statements. They are accounts assailed as incorrect, and probably it might be going too far to say the Returning Officer is not by implication bound to produce THEM—that it was an omission in the statute—he is certainly not expressly required to do so. But if he produce them, they are nothing more than the *prima facie* proof on which he acted.

But the statements are not evidence to guide to a decision as to the number of votes; and suppose the statute contemplates these being before the Judge, it is for a different purpose, and I do not see how that touches the matter of the voters' lists. The R. O. is not required to produce voters' lists, list of voters, poll book, or other matter, but merely the parcels containing the ballots used, and if the former were produced, I see no power to receive them in evidence. Outside of these ballot parcels I do not think the Judge can go for evidence as to the ballots. If it was intended to make other matter evidence it would have been specified, and the Judge empowered to order its production before him. I have said the Judge's authority is special, limited and restrained. Sub-sec. 2 of sec. 67 says that "at the time and place appointed for the recount, the Judge shall proceed to recount all the votes or ballot papers returned by the D. R. O." In doing this he is to open certain packets and no others, and sub-sec. 4 says, "he shall proceed to recount the vote according to the rules set forth in sec. 55, and verify or correct the account of the number of votes given for each candidate." Looking to sec. 55 for these rules we find them laid down for the guidance of D. R. O.; but, as already said, sec. 67 makes them the rule by which the Judge is to govern himself. These rules are as follow:—

In counting the number of votes for each candidate, the Judge is—

(A) To reject all ballot papers which have not been supplied by the D. R. O.

(B) To reject all ballot papers by which votes have been given for more candidates than are elected.

(C) To reject all ballot papers upon which there is any writing or mark by which the voter can be identified.

Rule B need not be noticed, it does not touch this case. In applying the Rules A and C to the present matter, A covers most of the ballots to which objections are taken, and I will first notice it.

Nearly 600 ballots cast at this election are questioned by reason, apparently, of some act or omission by the D. R. O. I know not if objections of the kind apply elsewhere, but some two weeks ago I had another recount wherein between 500 and 600 ballots were similarly assailed, and I think it highly probable every electoral district in the Province would be open to these objections; and the serious character of the action invoked from the agent for recounting is apparent. An election might be determined not according to the intention of the electors, but contrary to their intention, the majority disfranchised because a sworn public officer had failed to perform his duty in all its details. Moreover, if he was disposed to pervert his office it would be quite in the power of any D. R. O. in localities where opinions were pretty equally divided, to mould the result according to his wishes, and then we should have others playing at the same game. It would lead to incalculable evils. [Reference was here made to the views expressed by V. C. Blake in his judgment in the Monck case, reported 12 C.L. J., N.S., 113.] If a judge acting in a court capable of getting at the root of the thing, and scanning all the circumstances, so viewed the matter, one acting under the limited power sect. 67 gives may well decline to punish a body of voters by disfranchisement for any act or omission of the D. R. O.—a sworn officer under the Election Act.

Looking into the duties of D. R. O., they are, to my mind, capable of being viewed in two distinct stages. First, the duties *up to the time the ballots are cast;* then the duties afterwards *in opening the ballot-box and counting the votes.* (It is quite possible that the first of these duties may be done by one person, the second by another.—Sect. 32.) The first may doubtless be enquired into and dealt with in an election court, but it seems to me that the judge, under sect. 67, has neither the power nor the means of enquiring into them. If he assumes *anything* respecting them, he assumes all things rightly done by the appointed officers. It will be observed that two oaths are required, the first, K, general, and the second, Q, with a special clause vouching the correctness of the number of votes and the correctness of the count from the ballots.

If it was necessary to the sufficiency of a ballot that all the D. R. O. is required to do under the Stutute was done as prescribed, it would involve an enquiry going back upon what the D. R. O. had done, what he had omitted doing from the first, which surely could not be conducted or decided outside of an Election Court. The more I consider the question, the more I am satisfied

that no act or omission of the D. R. O. in dealing with a ballot before or after it has been cast by a voter, would warrant me in disallowing it for the candidate indicated by the voter. But just look at it! The voter comes to the poll, it is found he is entitled to vote, he asks and receives a ballot paper from an officer appointed to issue it. The voter marks the ballot with an X for the candidate of his choice. He folds it up and gives it again to the same officer, who drops it into the ballot box then and there. The same day, at the close of the poll, and when everything is fresh in the mind of the officer, the ballot box is opened, and surely it would be a monstrous thing if the same officer could (in effect) say, "True, I supplied that bit of paper as a ballot, true you marked it properly, but I did not comply with the requirements of the statute; I must reject it." Yet that is just what I am asked to do. The law never could have contemplated anything so unjust. My finding, acting under the Rule A., so far as this enquiry is concerned, is that all the ballot papers in the several ballot parcels opened by me were supplied by the several D. R. O., and I include the written ones, of which I say more presently. If substantial injury has been caused by neglect of the D. R. O., there is a proper tribunal to rectify it. There is one particular act of the D. R. O. I might have referred to before; it is alleged that the number put on the ballots is the number on the voters' list, and so furnishes the means of knowing the voter, and that this vitiates the votes. Assume for the sake of argument that the voters' list number would be a means of identification. How can I know, as a matter of fact, that the number on the ballot and that on the voters' list correspond. The voters' list is not before me. As I have already said, it forms no part of the material committed to me as evidence, and the argument being based on a fact I cannot assume and have no means of "finding," seems to me to fall to the ground. Very possibly the fact is as alleged; but the parties are standing on their strict legal rights, and I cannot go beyond my authority in dealing with them. I think the case before me is different from that which my brother Clark dealt with in a very able judgment. I judge that he thinks with me that it is not permitted to look at the voters' list as evidence.

But for some reason disclosed to him in the examination of the ballots, he saw in *certain* ballots with numbers, not in all, sufficient to warrant him in coming to the conclusion that the numbers furnished marks by which the voter could be identified. I do not see any such indication in the numbered ballots before me; there is nothing to show me when they were numbered—nothing that would make the fact reasonably clear to my mind on the mere inspection. I should certainly say they do not appear to have been put there by the voter. As I understand the learned Judge Clark, we are at one as to guiding principles; if we differ it is in the application of these principles. I can only hope I am right in the strong view I entertain as to no act of the D. R. O., as I have stated, disfranchising a voter. With regard to the written ballots, I have a word or two to add. In two of the polling divisions, namely, No. 15, Huntsville, and No. 21, Huldum Hill, the parcels when opened contained both written and printed ballots. [The particulars in these were then given.] How this happened, or why written ballots were used, I know not; I can see that all were counted. The voting with these papers was extensive on both sides. They appear to have been deliberately prepared, cut into the usual size of printed ballots. All were of the same general character, and I would say prepared on a uniform plan, the writing being the same in one of the polling sub-divisions. All, or nearly all, appeared to have the initials of the D. R. O., and as far as I could judge, nothing showed any indication of fraud or corrupt intention. Now when the D. R. O. opened their ballot boxes and found these written ballots, they would, if they had not supplied them, be at once attracted by their appearance; but they passed and counted them for both candidates. They, in effect, found that these ballots had been supplied by them, and I have no ground to doubt the fact that they were. They were wanting in the full particulars of the printed ballots, but they were supplied to voters as ballots and used as such, and I think I should consider and count them as good. It may be as contended, the ballots are wanting in essential details required by the Election Act, and there is a great deal of force in what Mr. Lash urges on many points. I cannot accept the contention that the act of giving these papers by the D. R. O. was an absolutely *void* act, though an Election Court might *avoid* the election by reason of the act, considering it went to the merits and ran counter to the Elec-

tion Law; but I do not think I can properly do so. Looking at the ballots there could be no question as to whom the voter intended to vote for. The intention was manifest enough. A number of very important points are urged, and struck me as most worthy of mature consideration by a competent tribunal, but these are questions which on the ground I have before referred to, I think must be left to the decision of such a tribunal. I found the ballots in the parcels, and they were recognized as issued by the D. R. O. If, as suggested, the ballots were supplied because the R. O. had not sent sufficient printed ballots, I see that under sec. 30 the D. R. O. *can cause a ballot box to be made* if the R. O. has failed to supply one. Is this a less important act? But the Statute made no provision in respect to such contingency of ballots running short, and having provided in the other case, the maxim already referred to may well be urged; however, I am not concerned with the solution of this question with the view I have taken. In leaving this branch of the subject, I must say that while I feel strongly with regard to the other ballots challenged on the other general objections, I am by no means so confident with regard to these written ballots; but the very able argument on the subject by Mr. Lash is, I think, for a court capable of entering fully into the question, and not for me on a recount; and so I have allowed the written ballots. There are still left some sixty-eight ballots to be dealt with separately, to which special objections are taken. Some of these objections are remarkably minute and astute on both sides. If such objections are entitled to prevail, and people are held to pedantic accuracy, and the directions for voting must be followed so closely that every minute deviation will be held to vacate a vote, "the art of marking ballots" should have a place in our public school system, so that the rising generation may be taught how to vote, and a course of ballot drill might be necessary for the present race of voters before every election. I cannot think the law demands this extreme exactness in marking ballots.

The remarks in the Monck case upon this point must commend themselves strongly to every thinking mind. A large experience in examining ballots assures me of their truth. And when the ballot discloses with clearness for whom the voter intends to vote, and there is a reasonable compliance with the requirements by which a voter is to indicate on his ballot paper his final intention as to voting, I think it should be allowed. In rural constituencies especially, the wonderful variety of expression, so to speak, in the X is very striking—due, as suggested by V. C. Blake, doubtless to nervousness, awkwardness, or a desire to embellish, and I would add also, due in many cases probably to feeble or imperfect sight, marking on a rough table or bench, and sometimes, perhaps, to a whiskeyfied condition of the delineating voter.

CORRESPONDENCE.

Were ballots used in the late elections void if numbered by Deputy Returning Officers?

To the Editor of the LAW JOURNAL.

SIR,—Within the last few weeks opposite opinions on this question have been given by local judges and by counsel, as well as in newspapers. The question is not whether the Dominion Statute is the best law that could be framed on the subject, but what is the true interpretation of it as it stands.

Some contend that though this act expressly directs ballots to be rejected if they have on them identifying marks, nevertheless the general intendment of that law requires them not to be rejected if the mark has been made by a deputy returning officer. I oppose this contention.

I admit that the literal construction of any portion of a statute is no ground for deciding contrary to the general intent of the enactments as a whole, but there is danger in the ease with which one can persuade himself that he sees this intent, unless he will be guided by the ordinary meaning of the language which the legislature has selected to express its will.

As to the intent:—While listening to the arguments that the statute means each of these marked ballots to be counted if the purport of the vote can be ascertained, one might fancy that before the days of the ballot oppressed voters had been labouring under some difficulty in getting a vote recorded for their respective candidates, and that the ingenuity of legislators had been taxed to devise machinery which would make that more easy.

CORRESPONDENCE.

We know, however, that it was the country which had been suffering from the too ready reception of votes recorded really for corrupt purposes, and that the publicity of each elector's choice (a main element in that evil) was sought to be removed. I read the election act as a restraining, not an enlarging, statute.

It is true the end to be attained is to learn and give effect to the vote of the electors, but it is the electors as a whole, at the expense if necessary of individuals of them; the work to be done by the statute is principally to *confine* the receipt of votes to those tendered according to a prescribed method, to surround them with such strict regulations, that individuals, or even bodies of electors, shall lose their votes unless they conform to the conditions described by the legislature as necessary in the public interest; this I submit as the true *general intent* of the election law.

Different legislatures may hold different views concerning the length to which the principle of secrecy should be carried. One may think it expedient to ignore every ballot so marked as to lead to identification, and if this strict rule should be found sometimes to interfere with the will of the majority, then to bear the expense of a new election. By such a course the public might be convinced that without regard to cost or other consequences, secret voting would be maintained; and it may be argued that this method would eventually remedy the evil, more surely than by making exceptions.

Another legislature, however, may believe that wrong doing by deputy returning officers will be so rare that the principle of secret voting will not be seriously impaired by counting those votes which are made open votes through the fault of these officials.

Legislatures entertaining these different views would frame their respective statutes accordingly.

The present Dominion Election Law, sec. 55, enacts that the officer is to "count the number of votes given for each candidate. In doing so, he shall reject all ballot papers . . . upon which there is any writing or mark by which the voter could be identified."

Considering the mischief to be remedied, is it in the mouth of a judge to say, the object of that act can be accomplished by counting those votes under some circumstances better than by rejecting them?

In *Heydon's* case (3 Rep. 7) it was resolved by the Barons for the sure interpretation of all statutes that "the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*."

Very able jurists have over and over again pointed out the evil of disregarding express enactments—one laments "that in so many instances the courts have departed from the plain and literal construction of statutes." Lord Coke said "the good expositor . . . gives effect to every word in the statute," (11 Rep. 34).

Lord Tenterden said, "Our decision may perhaps in this particular case, operate to defeat the object of the statute, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to be the intention of the legislature."—(*Rex* v. *Barham*, 8 B. & C. 104).

Chief Justice Moss said the principle of the Ballot Act was "the securing of secrecy and the non-identification of the voter, but in working out this principle we are obliged to look at the precise machinery which the Act has devised and employed."—(*The Russell Case*, Hodgins 520). These rules of interpretation are so familiar to lawyers that the mention of them here almost requires an apology; the excuse is that they seem to have been overlooked lately in contending for a construction contrary to the express enactments of the statute in question.

So far I have dealt only with principles, but the authorities are, according to my understanding, entirely with me, or rather my view does but follow in their wake. It is not to be expected that the wording of the statutes of different legislatures would be exactly similar. I know of only one judgment (*The East Hastings Case*) on the very wording of the Dominion Act concerning these ballots, but there are others on enactments substantially the same.

In *Woodward* v. *Sarsons* (L. R. 10 C. P. 749) it appeared that the presiding officer at polling station number 130, improperly placed on every ballot (294 in all) the number of the voter as it appeared on the Burgess Roll. The

judgment of the Court (Brett, Archibald and Denman, JJ.) was read by Coleridge, C. J. After referring to the different sections touching the admissibility of ballots which did not conform to the requirements of the Act, and those sections are certainly not more positive in their terms than section 55 of our Act, he formulates the substance of them as follows:—"The paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted;" and he proceeds to say:—"Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station number 130, were void and ought not to be counted. There is a mark on them by which, on reference to the Burgess Roll, the way in which the voter had voted could be identified."

Inasmuch, however, as the rejection of these ballots did not alter the main result of the election, but only changed the majority by which the candidate was returned, a new election was not ordered.

In the *East Hastings Case* (not yet reported) our present question came up before Armour, J., for judgment.

There a deputy returning officer had endorsed on every ballot issued by him a number corresponding to the number of the voter on the voters' list; these ballots were counted, and the result was that the appellant was at first declared elected. On a recount before the local judge these ballots were rejected, and the majority of valid votes being for the other candidate he was accordingly declared by the returning officer to be entitled to the seat. All these facts were proved in court, and his Lordship held that the ballots could not be counted; though the improper act was not that of the voters or of either candidate, but only of the deputy returning officer.

The effect of the statute being to cast out these votes and so to thwart the wish of the majority of voters, a new election was ordered.

The most instructive case, however, is *The Russell Case* before alluded to, the more especially as the remarks af one of the judges (Blake, V. C.) in another case (*The Monck Case*, reported volume 12 of this journal, p. 113,) are sometimes referred to as supporting a view contrary to that which I am advocating. This *Russell Case* arose out of an election held after the Ontario Act of 1879. The evidence showed that the deputy returning officers of these sub-divisions had put numbers on the backs of the ballot papers corresponding with the numbers on the voters' list, believing it was their duty so to do. Separate judgments were pronounced by Moss, C. J., and Blake, V. C., each one stating the effect of thus numbering the ballots, both as it would have been under the Act of 1874, which is (on the point here discussed) substantially similar to the present Dominion Act, and as it actually was under the amending Act of 1879, which created a clause expressly for the purpose of keeping alive ballots, which under the former law would have been rejected in consequence of some fault of the deputy returning officer.

Moss, C. J., says: "In these cases it appears that the deputy returning officers endorsed upon the back of the ballot paper not merely their initials, but the numbers which appeared upon the voters' lists . . . Under the Act of 1874 (R. S. O. c. 10) that would, I apprehend, have been a fatal objection to the validity of the votes, but the Act of 1879 (42 Vict. c. 4) was passed for the very purpose of remedying that difficulty." And again he says: "It is only by virtue of the saving clause contained in that statute that he (the petitioner) is enabled, notwithstanding the mistake of the returning officer, to receive that seat to which the votes of the people entitled him."

In the same case Blake, V. C., uses this language: "The deputy returning officers are independent officers selected under the statute for the purpose of this duty. Unfortunately, ignorantly but honestly they so dealt with the ballots as that, except for the Act of 1879, these votes must necessarily have been rejected, while neither the petitioner nor the respondent is responsible for that."

I know of nothing in any judgment of a Superior Court which weakens either of these decis-

ions. They strike me as direct and conclusive on the question now discussed.

One word more on *The Monck Case*, the earlier exposition of the ballot law by Blake, V. C.

The Dominion Act of 1874, sec. 55, required the deputy returning officer to reject all ballot papers not similar to those supplied by him or contained in envelopes not similar to those supplied by him. A previous section, 53, directed him to put his initials on each ballot paper before giving it to the voter—that was evidently one method by which the officer, before counting the ballot, could know whether it had been issued by him, but it was not necessarily the only method; and the statute did not direct a ballot to be rejected in the absence of his initials; to do so would therefore have been going *beyond* the letter of the statute. The Court was asked to do this, but the learned Vice Chancellor gave convincing reasons for not doing so—for not *lightly* disfranchising electors. That was, however, a different matter from counting votes which the statute in plain language directed to be rejected, and on the duty of a court on that subject, his later judgment gives no uncertain sound—"*Except for the Act of 1879 these votes must necessarily have been rejected.*"

There is no "Act of 1879" to save such ballots cast at the late election.

Your obedient servant,

N. A. D.

August 8th, 1882.

[We willingly give space to the communication of our correspondent, without, of course, endorsing his views on its subject, as we think that it presents a carefully considered view of a question which has public, as well as professional interest, as is evidenced by numerous articles and letters which appeared in leading journals after the holding of the recent Dominion elections.—EDS. L. J.]

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Rectifying mistakes in wills.—*Eng. L. J.*, July 15.

The liability of building owners.—*Ib.*, July 29.

Distress for rent.—*Ib.*

Restrictive covenants as to land.—*Irish L. T.*, July 22. (From *Justice of the Peace.*)

Presumptions of life and death.—*Irish L. T.*, July 29, Aug. 5.

Cruelty warranting divorce—Accusing wife of unchastity.—*Albany L. J.*, July 29.

A reverie on a warranty deed.—*Ib.*

Ordinary prudence in false pretences.—*Ib.*, Aug. 5.

Alteration of written instruments.—*Central L. J.*, July 28.

Books of science as evidence.—*Ib.*, Aug. 4.

The rights of pew-holders.—*Ib.*, Aug. 11.

Expert testimony—Examination of written documents.—*American Law Register*, Aug.

Malicious prosecution.—*American Law Mag.*, Aug.

Lawyers *vs.* Bookmakers.—*Ib.*

FLOTSAM AND JETSAM.

QUOTATIONS IN COURT.—It is dangerous to quote in Courts of law, even when the quotation is familiar. In the course of the trial of *Doherty* v. *Lowther*, Baron Huddleston remarked that he would have to interpret the rules of racing and of the Jockey Club, however incompetent to do so. Whereupon the defendant's counsel said gallantly, "'I would not hear your enemy say so,' my lord," quoting Hamlet's protest against Horatio's self-imputed "truant disposition." This was reported as "I do not hear, my lord, your enemies say so;" as if the judge had enemies who went about saying that he knew too much about racing, whereas, in truth and in fact, the learned baron has no enemies at all. Next day the report was corrected by substituting, "I would not hear your enemies say so," which scarcely mends the matter. It is hard that misquotations shoud be suffered at the hands of brother reporters by an eminent law reporter; for such Shakespeare, amongst other things, appears to have been, as one, at least, of his cases is preserved, and is confirmed by the reporf of Plowden.—*Law Journal.*

The appointment of Mr. Thomas Hughes to a County Court judgeship may perhaps do something to weaken the prejudice that literature is incompatible with law. It was proof against the practical test of a man of letters becoming Lord Chancellor, which produced the sarcasm that Lord Brougham would know a little of everything if he knew a little law. When Samuel Warren brought out his 'Ten Thousand a Year' his friends professed to be anxious to know who wrote the law in it. Yet Brougham was a good though not a great, lawyer; and Warren, at least, made an efficient master in lunacy. Probably Sir Walter Scott, who never rose in the law beyond a subordinate post in the Court of Session suffered through his fame as a writer. The County Court bench has hitherto been free from the suspicion of letters, but the author of 'Tom Brown' may find a precedent in the case of the author of Tom Jones.' Fielding was an admirable police magistrate, and his novels gained from his experience in Court, while his law was probably not the worse for his having an imagination.—*Law Journal.*

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DIARY FOR SEPTEMBER.

17. Sun. *15th Sunday after Trinity.* First U. C. Parliament met at Niagara, 1792.
19. Tue. President Garfield died, 1881.
20. Wed. Lord Sydenham, Gov.-Gen., died 1841.
24. Sun. *16th Sunday after Trinity.* Guy Carleton, Lieut-Governor, 1766.
30. Sat. Sir Isaac Brock, President, 1811.

TORONTO, SEPT. 15, 1882.

THE Benchers met in Convocation on the 8th inst., for the purpose of electing successors to Messrs. Stephen Richards, Q.C., and John Bell, Q.C., who have forfeited their seats through absence during four terms. Mr. Bell was re-elected; and Mr. Alexander Leith, Q.C., whose face it is a pleasure to see once more in Toronto, was substituted for Mr. Richards, this also being a case of re-election.

ACCORDING to the latest returns from Somerset House, no less than 12,914 solicitors have taken out their certificates in England for the purpose of practising during the present year. Of these 4,663 practice in London. When we read these figures it is not surprising to find, as the fact is, fully competent solicitors in England content to work for years as managing clerks for salaries of from $700 to $1.000 a year, only, perhaps, at the end to buy themselves into a firm at a premium of several thousand pounds.

AN interesting question of international law was raised and fully argued by counsel in the *Hall Extradition Case*, which came before the Divisional Court of the Chancery Division on the 9th inst., namely, as to the proper construction and operation of the Ashburton Treaty, entered into in 1842 between the Government of Great Britain and that of the United States, with reference to the extradition of criminals for certain offences therein named. Counsel for the prisoner argued that if the crime with which he is charged would not have fallen within the term "forgery," as that term was understood in England and the United States in 1842, he should not be surrendered. Mr. Fenton, on the other hand, who appeared for the Crown and for the United States authorities, contended that though the act alleged against the prisoner might not be forgery as it was understood in England in 1842, yet if any subsequent Canadian Act had made it forgery the operation of the Treaty covered the case, and he should be surrendered. Judgment is reserved, and if the Court should decide that the offence charged constitutes "forgery" at common law, and as understood in 1842, it may not be necessary to deal with the above question at all.

THE Divisional Court of the Chancery Division gave judgment in the case of *Mc-Tiernan* v. *Fraser*, on the 9th inst., on a point of practice of much importance. The cause was heard before the Judicature Act came into operation, and a reference was made to the Master. Both parties appealed from the Master's report, and the matter having been referred into Court from Chambers, Proudfoot, J., gave judgment in June last, varying the report and referring the matter back to the Master. In August last, notice of appeal to the Divisional Court was served, but that Court has now decided that there is no such right of appeal, but that the parties must go to the Court of Appeal. The Chancellor, in delivering judgment, observed the policy of the

Judicature Act is not to encourage these intermediate appeals; and he also said that O. 494 did not apply to the case, inasmuch as the cause was not pending in the sense of that order. What was pending was the proceeding in the Master's office.

JUST before going to press we have received the completed series of lectures recently delivered by Mr. Joseph E. McDougall before the law students of Toronto, on the subjects of "Torts and Negligence." The lectures have, as our readers are aware, been appearing, from time to time, in pamphlet form, under the editorship of Mr. J. P. Mabee, a law student, who, we gather from the introduction, took them down in short-hand at the time of delivery, and afterwards submitted them to the revision of the learned lecturer. Mr. Mabee has now, we are glad to see, published the whole series in the form of a small book, adding a good index and a table of cases. It is needless to dwell on the service rendered to the profession by giving them, in a permanent form, lectures on which so much labour has been spent, and which bring under review so many Canadian, English and American cases on the subjects on which they treat; while at the same time students who are preparing these subjects for examination ought to be specially grateful. We may take occasion to refer more at length to these lectures in a future number.

WE learn on what we consider good authority that some of the chief and more influential Queen's Counsel in England, after studying with care the judgment of the Columbian Supreme Court Judges in the *Thrasher Case*, have given their opinion "that those Judges have satisfactorily made out that the Supreme Court of B. C. is a Dominion Court, and not a Provincial Court within the B.N.A. Act, 1867, sect. 92, par. 14."

We also hear from Victoria, B.C., of a judgment of the Chief Justice in a recent suit in the Supreme Court of B.C.,—*Morne* v. *Morison*—which decided on the illegality of the Local Government tax sales of land for several years. If the hurried note of it which reached us be correct, we are interested in this judgment inasmuch as it contraverts the position, apparently, laid down by the Hon. Edward Blake (and adopted by Mr. Alpheus Todd) when M. J., in his official minute, (Sessional Papers, vol. x., 1876,) to Lord Carnarvon, on the practice of the Privy Council of Canada, of taking approved reports of Committee of Council, held without the Governor-General being present, as having the legal operation of actual orders made by the Governor-General in Council, where His Excellency is present. The note which reaches us is that Reports of Committee of Council approved by His Excellency, but not in Council, and not containing the operative words "it is ordered," cannot convey any authority to appointees thereunder, by virtue of certain Acts, *e. g.*, tax Acts, prescribing such appointments should be made by *order* of a Governor-General (or in Local Acts a Lieutenant-Governor) *in Council*, although for many purposes an approved report of a Committee of Council may be the most appropriate mode of carrying out certain objects. *Morne* v. *Morison* was partly determined on that ground, and an appointment of an assessor with arbitrary power in the taxation, assessment and sale of land, declared null, and set aside; and his acts avoided in consequence.

AMONG the latest books sent to the secretary of the Law Society is one the existence of which may not be generally known. It is the Incorporated Law Society Calendar for the year 1882. This is a new publication, and is, in some respects, a rival of the well known Law List published by Stevens & Sons. This, the first calendar, appropriately opens by an account of the origin of the Society,

and a general review of its past labours, from the year 1825, when it was first projected, up to the present time. The work of the Society in establishing an efficient system of examination and lectures is pointed out; and also the influence brought to bear by it upon the Statutes specially affecting the professsion. "Every available opportunity," says the writer, "has been taken of obtaining the introduction into current legislation of provisions furthering the just advancement and protecting the interests of solicitors as a class." Reference is also made to the Society's action in upholding the discipline and guarding the good name of the profession by taking steps to secure the closing of its ranks against those who were, in the Society's judgment, not fit to enter them, and the total or temporary expulsion of those who, having gained admission, by their unworthy acts tarnished the honour of the general body of its members. This part of its functions the Society has been enabled to perform more effectually by reason of the Imp. Solicitors Act of 1874, which provides that notice shall be given to the Society of all applications made for the removal of the names of attorneys and solicitors from the roll, and that it shall be at liberty to appear and be heard on such application. "The Incorporated Law Society," says the writer, "must ever aspire to be a faithful leader and a true reflex of enlightened views, and a watchful guardian alike of the honour and of the best interests of a learned profession." The Calendar then proceeds to set out various Acts relating to solicitors, lists of candidates at the examinations of the past years, specimens of the papers set, etc. It then gives the names, firms, etc., of London and country solicitors who are members of the Society. Lastly, under the heading "Foreign Corre. spondents of Members of the Society," it gives, under the places where they practice, the names of various practitioners in the Colonies and abroad, with the name of the English firm with whom they respectively correspond. Many Canadian names appear here, and there is this advantage over the Law List, that no fee is exacted for the privilege of insertion, whereas the publishers of the Law List charge £1 for each member of a firm whose name they insert.

THE VALUE OF CHILDREN.

[COMMUNICATED.]

We are not going to consider the value of babies as alarum-clocks for arousing the male parent; nor as teachers of patience—the virtue, not the opera; nor as gainers of prizes at country fairs. Nor are we going to quote their market values south of Mason and Dixie's line in the days before the war; nor will we dilate upon the bounties offered by that paternal monarch, Louis XIV., for the production of children in New France, although he, in council, passed a decree, saying, "that in future all the inhabitants of the country of Canada who shall have living children to the number of ten, born in lawful wedlock, . . . shall each be paid out of the money sent by his majesty to the said country a pension of 300 livres a year, and those who have twelve children, a pension of 400 livres." Rich and poor were alike within the purview of this ordinance, whereas before Colbert's reward of 1,200 livres for those who had fifteen children, and 800 to those who had ten, was intended specially for the better class.

But we are about to refer to some of those cases where juries and judges have been called upon to estimate the sums that will compensate for injuries arising from the negligence of others to life or limb of infants, and the value of the services of which the parents of these injured innocents have been deprived by such hurts. This is a subject which must be replete with interest to every *pater familias* in humble circumstances—and how many a solicitor of the High Court of justice is so situated!

First, let us look at the value of children piece-meal, or rather what persons injuring portions of their little human forms divine have had to pay for their negligences and ignorances. A boy, seven years old was kicked by a horse, and had his eye, skull, and brain so badly hurt that the witnesses at the trial considered he would never be able to earn his own living; and they were right, for the poor little chap died nine days after the trial. The jury gave him £150 as a slight compensation; the owner of the horse not liking to pay that sum applied for a new trial, but the Court did not consider the damages excessive, and would not interfere.—*Kramer* v. *Waymark*, L. R., 1 Ex. 241.

A child of two years was wandering about a railway track when it was struck by an iron horse, and was so injured that a leg and a hand were lost. The jury, when asked to assess the damages, gave $1,800 as a recompense. ("Redfield on Railways," vol. 2, p. 243, n.) Surely this little trot could not have brought more gain to its parents if it had been actually born with the legendary silver spoon in its mouth. This valuable child dwelt in Connecticut.

Out in Missouri a boy lost his hand through a defect in a moulding machine, and upon suing the owner, who was also his employer, he recovered $1,000. The Court sustained the verdict.—*McMillan* v. *Union Press-Buck Works*, 6 Mo. App. 434. Little Mangan, an English boy, had nothing like the same good fortune, although his misfortune was very similar. He was a small school-boy of four summers, and when passing homewards one day was induced, by a brother of the more mature age of seven, to put his fingers into a machine for crushing oil-cake that was standing unguarded beside the road. Another mischievous little wretch turned the handle and round went the wheels; the chubby fingers were seized and badly crushed, so that three of them had to be amputated. The owner of the machine was sued for negligence in allowing it to stand so exposed, and at the trial the sight of the fingerless and maimed little hand could only induce the twelve honest-hearted jurors to give a verdict of £10 in favor of the boy. Even this pittance Mangan was not able to get because the Court held that the defendant was not liable for the injury, as it was caused by the act of the plaintiff and the boy who turned the handle.—*Mangan* v. *Atherton*, 4 H. and C. 388; L.R. 1 Ex. 239.

Another little boy in England, aged five years, was equally unfortunate. Being too young to take care of himself his granny went with him to Velvet Hall Station, to take the train to Berwick-upon-Tweed. After getting their tickets, on crossing a track they were struck by a freight train, the old lady was killed and the child severely injured. An action was brought for these injuries to the lad, and the jury awarded £20. The Court, however, set aside the verdict as the jury had found that the grandmother had been guilty of negligeuce, without which the accident could not have happened; and the Court considered that the infant was so identified with the grandmother that the action could not be maintained, her carelessness being a sufficient answer to the claim. *Waite* v. *N. E. Ry.*, El. Bl. & El. 719.

In Mississippi a man had to pay $100 for merely whipping a child of five, who had, however, assaulted in a violent and brutal manner (so saith the reporter) the whipper's only child, an infant of eighteen months.—*Lowell* v. *McDonald*, 58 Miss. 251. In Massachusetts a Miss of thirteen winters recovered damages to the extent of $5,000 against a railway company for an injury to an arm; and then when she was of age her father sued the company for the loss occasioned by the selfsame accident, of her services during minority, and he obtained $500 to compensate himself wherewith.—*Wilton* v. *Middlesex, Ry.* 125 Mass. 130. The gentler sex is highly prized in New England, judging by this and the Connecticut case. Boys, however, at least in the

west, are deemed mere money-making machines. Old Miller's boy, of nineteen, lost his arm through the negligence of a railway company, and the father recovered $2,000 for the value of the son's services until he came of age, and for the expense of medical attendence and nursing in consequence of the injury.—*Houston, &c. R'way* v. *Miller*, 49 Tex. 322.

And now let us consider some of the amounts that have had to be paid where the wrong has caused the death of the child. In such case the rule is that damages of a pecuniary nature must be shown; the damages are not to be given merely for the loss of a legal right, but should be calculated with reference to a reasonable expectation of a pecuniary benefit, as of right or otherwise, from the continuance of the life of the lost one. (*Franklin* v. *S. E. Ry.*, 3 H. and N. 211; *Walton* v. *S. E. Ry.*, 4 C.B., N.S. 296.) In fact, what is laid down by the decisions is, that there must have been a reasonable expectation of pecuniary advantage to the parent from the life of the deceased. (Field, J., *Heatherington* v. *N. E. Ry.*, L.R. 11, Q. B. D. 160.) Still it was held, in a case where a healthy boy of six years old was killed, that absence of proof of any special money damage flowing from the death of the child will not justify a non-suit, nor a direction on the part of the judge to the jury to find nominal damages only. (*Gorham* v. *N. Y. C.*, 23 Hun. (N.Y.) 449.) The "necessary injury" to a parent by the negligent killing of a child, and for which he is to be compensated, comprises the loss of the services of the child during minority, the costs of nursing, medical attendance and the funeral expenses. (*Rain* v. *St. Louis, etc., Ry.*, 71 Mo. 164.) In England doubts have been suggested as to whether damages are obtainable to compensate for the loss of the services of a child so young as to be unable to earn anything. (*Bramhill* v. *Lee*, 29 L. T. 11.) But in the United States the doctrine has been well settled. In *Hill* v. *Forth second Street Railway*, 47 N. Y. 317, where a boy of three years and two months had been killed, and the jury had given a verdict for $1,000, the Court of Appeal sustained it, saying, "It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an esitmate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years, and to hold that without such proof the plaintiff could not recover, would in effect render the statute nugatory in most cases of this description. It cannot be said, as a matter of law, that there is a pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury." As Eliza Hooghkirk, a healthy and bright child of six, was being driven by her father, on a waggon, into Albany, the waggon was struck by a locomotive and substantially destroyed; all the inmates were injured, but the child was killed. The jury was particularly instructed that in estimating the damages they should be strictly confined to the pecuniary injuries resulting from such death to the next of kin of the deceased—that the pain and shock to the feelings of the parents, caused by the death of their daughter, could not in any way be considered, and that in fixing such damages they should be guided by what, in their honest judgment, they should deem a fair and just compensation for the pecuniary injuries resulting from such death, which compensation, however, could not, according to the statute, exceed $5,000. After this charge the jury awarded $5,000, and the Court was asked to set the verdict aside as excessive, but declined to interfere, saying, that as a matter of law it is impossible for any Court to say that the ac-

tual "pecuniary injuries" resulting from the death of the infant might not be $5,000. Possibly the probabilities are against it, but the statute in this region of conjecture has committed the formation of an opinion to a jury upon whose discretion the only limitation is the maximum which is thereby allowed. The discharge of such duty, expressly confided to a jury by statute, necessarily, in a case which presents reasonable grounds of conjecture, involves a wide discretion, and unless the evidence shows a plain error the verdict cannot be disturbed.

Hetty Downie, a girl of the age of about seven years, was run over by the cars of the New York and Harlam River Company, and killed. She lived with her mother. On the trial anon—suit was asked for on the ground, amongst others, "that there was no proof of any pecuniary or special damages sustained by the plaintiff or by the next of kin." The motion was over-ruled, and the plaintiff had a verdict of $1,300. The Court of Appeal said:—It is not required, to sustain the action, that there should be proof of actual pecuniary loss. The damages are to be assessed by the jury with reference to the pecuniary injuries sustained by the next of kin in consequence of such death. This is not the actual present loss which the death produces, and which could be proven, but prospective losses also. They may compensate for "pecuniary injuries," present and prospective. *Oldfield* v. *N. Y. and H.R., Ry.*, 14 N.Y. 310. In *McGovern* v. *N. Y. C. and H.R.R.*, 67 N.Y. 417, the action being for the death of a boy eight years of age and the recovery, $2,500, the Court held that the jury could estimate the whole damages sustained by the father from the death, as well as those proceeding from the loss of services during minority as those after, and would not interfere.

On the other hand, in Arkansas, the Court considered that $4,500 was an excessive sum for a railway company to pay to a mother for the loss of the services of a child five years old, through the negligence of the Company. *Little Rock, etc., Railway* v. *Barker*, 33 Ark. 350. In this case it was decided that no compensation was to be given to the dead infant's parent for the loss of the companionship of the child. In Indiana, in one case, a father made no claim for the loss of his child's future services, and gave no evidence to show his loss; so, although the jury gave him $1,800 therefor upon the death of his child, the Court considered it excessive—*Penn. Railroad* v. *Lilly*, 73 Ind. 252. The amounts awarded in England have been by no means as great as in America. In one case were an action was brought by a father, who was a working mason, for injury resulting from the death of his son, a lad of fourteen, who had been earning four shillings a week, but at the time of his death was out of employment, the jury found a verdict with £20 damages. A motion was made to set it aside as excessive, but the Court held that the father was entitled to retain the amount.—*Duckworth* v. *Johnston*, 4 H. and N. 653. We quite agree with Martin B. when he says, "If damages are to be given, I think that £20 is not too much."

RECENT ENGLISH DECISIONS.

Of the June number of the *Law Reports*, the cases in 7 P. D. 61-102; and 20 Ch. D. 1-229, still remain for review.

WILL—MISTAKE.

In the former, the only case which it appears necessary to notice is *Morrell* v. *Morrell*, p. 68, an article on which was republished from the English *Law Journal*, in our last number. In this case an intending testator instructed his solicitor that he wished to leave all his shares in a particular company to his nephews. The solicitor embodied these instructions in writing, and sent them to a conveyancing counsel to draw the will. In

these instructions the solicitor spoke, as directed, of "all" the said shares; but, by some accident unaccounted for, the counsel introduced the word "forty" before "shares" in the draft. The testator really owned four hundred shares. Though the solicitor saw the word "forty" in the draft, it never attracted his attention, and he did not realize its effect, nor did he inform the testator in anyway that the word "forty" had been introduced; and the actual will as executed was never read over to the testator, who never even heard of the introduction of the word "forty," but executed the will believing that it carried out his instructions. Under these circumstances, the President held that the word "forty" which had been introduced without the authority of the testator, might be struck out. He said he did so on the same principle as that on which in *Fulton* v. *Andrew*, L. R. 7 H. L. 448, where a residuary bequest was introduced into a will *without the knowledge and authority of the testator*, the clause containing that bequest was rejected. It may be observed that in his instructions to the jury in this case, the President remarks that there is no difference between the case of a testator referring it to a particular person to express his wishes, who makes the mistake, and himself, knowing what his own wishes are, and setting about to express them, making the mistake. If he trusts to anybody else to express his wishes, and *adopts* the words used by that person as his own, then that alone can remain as the evidence of his intention. But in *Morrell* v. *Morrell*, the jury found as a matter of fact that the testator did not approve of the word "forty" being used, *i.e.*, that he instructed his solicitor as to the whole of the shares, and only approved of the draft upon the supposition that the solicitor had carried out his wishes.

Proceeding now to the June number of the Chancery Division (20 Ch. D. 1-229), the first case (*Redgrave* v. *Hurd*), has been already noted, *supra* p. 174, as reported in the Law Journal Reports for February last.

ACTION FOR DECEIT—COMPANY—FRAUDULENT PROSPECTUS.

Next comes a long report of the case of *Smith* v. *Chadwick*, p. 27, a case similar to the recent case of *Petrie* v. *Guelph Lumber Co.* in our own courts, *supra* p. 176; that is to say, it was an action brought for damages alleged to have been sustained by the plaintiff by his having been induced to take shares in a certain company, by the fraudulent misrepresentations of the defendants, an action which used to be called an action of deceit. The following are certain propositions of law which are illustrated by the judgments of the Court of Appeal in this case of *Smith* v. *Chadwick*:—(i) Such an action as this, although brought in the Chancery Division, is a mere common law action of deceit. In order to entitle the plaintiff in such an action to relief, it must be shown first, that representations, which in fact were not true, had been made by the defendants; that these representations were made by the defendants, either with a knowledge that they were not true, or recklessly, in which case, although they knew not of the untruth, they would be liable as if they had known that the statements were untrue. But that is not all. It must be shown, also, that the plaintiff was deceived, and induced by the deceit that was practised upon him to do something to his prejudice in respect of which prejudice he claims damages. In an action for deceit there must be a misstatement; mere omission is not sufficient to maintain that action, unless the omission makes that which is stated untrue. (ii) On the question of the materiality of the statement or representation, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may show that in fact he did not so act in one of two ways, either by showing that

he knew the truth before he entered into the contract, and, therefore, could not have relied on the mis-statements; or else, by showing that he avowedly did not rely upon them, whether he knew the facts or not. He may by contract have bound himself not to rely upon them, that is, to take the matter at his own risk, whether they were true or false, or he may state that he did not rely upon them in the witness-box. A false statement may be obviously material, and, if so, the natural inference would be that the plaintiff relied upon it, and was misled by it. If the statement is not obviously material, a plaintiff may ask the Court, or a jury if he goes before a jury, to infer the materiality from the fact that he understood the representation in such and such a way, and acted in such and such a way, and was prejudiced. Or he may show affirmatively by other evidence that the statement was material, and that he was deceived. (iii) Where a statement is ambiguous, so that it may have one of two meanings, the plaintiff must tell the Court what he relied on. It is for him to say, "I relied on the statement in this meaning, that is the meaning I took; if it is ambiguous, it is the fault of the defendant, and relying on that, I entered into the contract." It will not do for him to say in answer to interrogatories as to the meaning which he put upon the misrepresentations alleged in the statement of claim, "I understood the meaning of such misrepresentations to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning therefor." He cannot refer to the obvious meaning when there is no obvious meaning. When a representation is capable of two meanings, and a man comes to complain of being deceived, he is bound to tell the Court which meaning he attached to it, because he may have attached to it a meaning which the Court does not attach to it, and then he was not deceived at all. If the plaintiff will not tell the Court which meaning he attached to the representation, the Court cannot say that he was deceived. (iv) It has always been held that if a man in a prospectus, or in a written statement, particulars of sale or otherwise, falsely states the contents of a written document, he cannot escape from such false statement by saying, "I offered to show you the document." But if he makes an incomplete statement, altogether true but imperfect, he can. He says, "I did not mislead you at all; I did not state the whole of it; I said, go and look at the whole of it; the whole of it is in a copy which you can see; I did not profess to state the whole of it; I put you on your guard; I said, you can go and look at the whole of it." (v) To state in a prospectus that someone is a director who is not a director, is not necessarily a material misrepresentation. The names of the directors form an important element with many people as to whether or not they shall decide upon joining a company; but that must depend on their knowledge of the directors, their personal knowledge, or knowledge of their names and positions, otherwise the mere fact of stating that such and such persons are directors will be nothing. You may, however, have names so well known, so notorious in connection with the subject-matter of the prospectus, that even the Court would come to the conclusion that the name, even of a single director, was an inducement to persons to join the concern.

DOUBLE PORTIONS—SATISFACTION—BOND—PARTNERSHIP.

Of the next case, *In re Lawes*, p. 81, it seems only necesssary to say that, on November 25th, 1868, one L. entered into a bond to pay to his reputed son £10,000, on April 30th, 1872. On March 22nd, 1872, L. entered into an agreement for partnership with his said reputed son, and by the articles it was provided that the capital should consist of £37,500, to be brought in by L., of which £19,000 should be considered as belonging to his son. L. having died without having paid any part of the £10,000 secured by the bond, the Court of Appeal held unanimously, affirming the decision of Fry, J., that the rule

against double portions applied, and that the benefit given to the son under the partnership articles must be taken in satisfaction of the sum due under the bond. Jessel, M.R., observes:—"It is perfectly clear that by that deed the testator gave his son a share in the partnership capital, which share was to be taken at £19,000;" and going on to refer to the words of Sir W. Grant in *Bengough* v. *Walker*, 15 Ves. 507, he says:—"The true meaning of that is, that where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise. And when he gives it as being of larger amount than the legacy and the legatee takes it, he takes it at the estimated amount, and in that case it makes no difference whether the testator directs the thing to be sold and gives him the proceeds, or directs the thing to be taken as a specific amount. In either case he shows his intention to give a definite amount."

SALE BY AUCTION—STATUTE OF FRAUDS.

The next case is a full report of the appeal in *Shardlow* v. *Cotterell*, over-ruling the decision of Kay, J., in the Court below, which is reported, L. R. 18 Ch. D. 280, and noted in this journal, *supra* p. 9. The facts were these:—An auctioneer signed the following memorandum at the foot of the conditions of sale:—"The property duly sold to A. S., butcher, Pinxton, and deposit paid at close of sale;" and he also signed this receipt:—"Pinxton, March 29th, 1880. Received of A. S. the sum of £21, as deposit on property purchased at £420, at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The conditions contained no description of the property sold. Both Kay, J., and the Court of Appeal held that having regard to the word "purchased" in the receipt, there was sufficient connection between the two documents to allow them to be read together as saying what was sold, but the question was whether, even taking them together, there was a sufficient description to satisfy the requirements of the Statute of Frauds. Kay, J., held there was not, for that a mere description of a thing sold as "property," was not sufficiently definite to enable parol evidence to be introduced to show what the thing sold was. He said that to his mind the word "property" was quite as vague as the word "vendor," and that has been held in England, as also in our own Courts in the recent case of *Wilmot* v. *Stalker*, *supra* p. 178, to be not a sufficient description of the party selling to satisfy the requirements of the Statute of Frauds. It was here the Court of Appeal dissented from Kay, J., holding the description of the property sold to be sufficiently definite in the present case. Jessel, M.R., and Baggallay, L.J., indeed, held that the receipt alone was a sufficient description of the property sold. The M. R., in his judgment, takes up the general question. What is necessary to make a binding contract within the Statute o Frauds? What is a sufficient description in writing? And he answers:—"No one can say before hand. You cannot have a description in writing which will shut out all controversy as to parcels, even with the help of a map. . . . No description can be framed that will prevent all dispute, and the framers of the Statute of Frauds knew very well that they could not prevent perjury altogether, but could only go some way towards it; and it was considered that to require a note in writing was a useful check . . . Looking at the Statute in that light, what is a sufficient description? I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, 'The estate of A. B., in the County of C.,' or 'the estate of A. B., which he bought of C. D.,' or "the estate of A. B., which was devised to him by C. D.,' would be sufficiently specific. If so, why should not 'the property which A. B. bought of C.D. on the 29th of March, 1880,' be sufficient."

TESTAMENTARY APPOINTMENT—REVOCATION.

In *Sotheran* v. *Dening*, p. 99, the Court of Appeal decides that a general clause in a will revoking all former wills, revokes a prior testamentary appointment. It was argued, as against this view, that a general clause of revocation in a will does not revoke a testamentary appointment contained in a previous will unless there is a special reference to it, or some other evidence of intention to revoke it, and two decisions of Sir Cresswell Cresswell were referred to in support of this argument, which Baggallay, L.J., reconciles with the decision in the present case, by saying:—"It has been decided that a general revocation of wills does not necessarily revoke an appointment by will. That view is adopted by Sir C. Cresswell in the two cases referred to. But it must be shown that it is entirely unreasonable that it should have that effect, otherwise it will be a revocation."

BREACH OF TRUST—DOWER—STALE DEMAND.

In the next case, *in re Cross*, *Harston* v. *Tenison*, p. 109, the Court of Appeal say in the judgment, which is the judgment of the Court:—"We consider it to be a well established rule that a *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain, unless there is something in the surrounding circumstances from which an intention so to do can be clearly inferred;" and it seems sufficient to add that this case illustrates the application of the rule so enuntiated, the Court holding that though the *cestui que trust* in question had obtained from the trustee a part, but a part only, of what they were entitled to, yet they did not thereby waive their right to further relief, for there was nothing to show that this was their intention, and they must not be taken to have elected to abandon their claim against the trustee, and to rest content with what they had obtained.

A.H.F.L.

REPORTS.

ONTARIO.

(Reported for the LAW JOURNAL.)

ASSESSMENT CASE.

IN RE APPEAL OF THE REV. JOHN STEWART FROM THE COURT OF REVISION OF THE TOWN OF KINCARDINE, IN THE COUNTY OF BRUCE.

Exemption from taxation—Probationer—R.S.O. cap. 180, sec. 6, sub-sec. 23.

The appellant was a duly ordained minister in actual connection with the Presbyterian Church in Canada, and at the time of the assessment, being without a charge, was duly entered on the list of probationers of the said Church, and performing his duties as such. He and his family resided upon and occupied property in the Town of Kincardine, owned by him, consisting of a dwelling house and two acres of ground attached, assessed at $1,300. His duty was performed entirely outside of the municipality, and at no particular place except as required by the probationers list. He claimed exemption under the Act.

Held, that appellant, as a probationer of the Presbyterian Church in Canada, though not doing duty in the municipality, is entitled to exemption under sub-sec. 23, sec. 6. R. S. O. cap. 180.

The appeal was heard by consent at the Village of Underwood, on 11th July, 1882.

From the evidence produced, it appeared that appellant was a regularly ordained minister of the Presbyterian Church in Canada, and had until December last been in charge of a congregation at Rodney, in the County of Elgin, Ont., had then resigned that position owing to ill-health, and came to Kincardine with his family to reside on property there (consisting of a dwelling house and two acres) belonging to himself. He was not doing duty as a clergyman or minister *in* the municipality. He had upon his resignation, and at his own request, been placed on a list, known as the "Probationer's List," of the Church, which is a list composed of names of ministers without charge, and whose names are entered on the list for the purpose of enabling them to obtain employment in the Church, and permanent settlement should a call be extended to them. A probationer in the Presbyterian

Church is a minister in actual connection with the Church, but without charge, who is sent by the proper committee of the Church, and under its supervision, to supply vacancies, and from the list of such probationers vacant charges are supposed to select their pastor. They have a prior claim to be heard for a call in the vacancies. The Church can only ask a probationer to supply vacancies. A probationer is in the active service of the Church in the sense of supplying pulpits, and performing pastoral duties in congregations to which he may be sent by the Distribution Committee of the Church. Appellant is at present in Manitoba, has permission to perform, and has hitherto been performing missionary services there in connection with the Church. At the time of the assessment he was on the probationer's list in this province. He intends returning to Ontario. The congregations at Kincardine being supplied, the appellant has no duties to perform in that municipality, nor is he liable, under such circumstances, to perform any duty as a clergyman under the direction of the Church or its committees in that municipality.

The printed probationer's list of the Church, together with the regulations affecting their duties, were produced and referred to.

J. H. Scott, for appellant.—The effect of the amendment to the former Assessment Act of 1859, is to require an active service to be shewn before exemption can be claimed; or, in other words, in order to establish a claim to exemption, the clergyman or ministor must be actually engaged in his calling. This has clearly been shown here. Under the Act of 1859, a retired minister, or even one holding the position of a college professor simply, could claim exemption. A probationer is as actively engaged in the service of the Church as a minister settled over a particular congregation, and he has the same duties to perform. The statute does not require service *within* the municipality where exemption is claimed, as the language is very general and refers to a connection "with *any* church." The word "church" must here mean "religious body." (See definition in "Reid's" and "Worcester's" Dictionaries. If, as no doubt the rule is, these sections must be construed strictly, no intention of the Legislature can be inferred or argued which does not clearly and expressly appear in the Act. The Assessment Acts, C. S. U. C., cap. 55, sec. 9, sub-sec. 22, and R. S. O. cap. 180, sec. 6, sub-sec. 23, were referred to.

W. C. Loscombe, for respondents.—Provision creating exemptions should be strictly construed—Har. Mun. Man, 4 Ed. 608, and cases there cited. It must be, but has not been, shown that the claim for exemption comes clearly within the letter of the statute. From the evidence it is proved that appellant is a minister without charge, and so is not in such connection with the Church as contemplated by the 23rd sub-sec. of sec. 6 of the Assessment Act, and is not actually doing duty as a clergyman. The duties to be performed by a minister or clergyman should be performed within the municipality in which exemption claimed. The meaning of the word "Church," as used in the sub-sec. referred to, means that particular church or place of worship situate within the municipality, and not the particular denomination or religious body into which the clergyman has been admitted and ordained. Any duties appellant is performing in connection with the Presbyterian Church are being performed in another province. It never was intended by the statute to exempt from taxation a parsonage for a minister who was doing duty as a clergyman in another country. (See *O'Connor, appellant, and Town of Barrie, respondents*, 13 U. C. L. J. 273. The object in exempting from taxation a parsonage or other dwelling of a minister, and throwing the burden of the taxes on the other ratepayers is so that, in return, they may have the benefit of the minister's services amongst them. If such is the intention, his residing in another province prevented this.

Judgment was delivered as follows on the 18th July, 1882.

KINGSMILL, CO. J.—From a careful examination of the evidence before me I am of the opinion that the Rev. Mr. Stewart's dwelling house and two acres, situate as within described (*i. e.* in statement of appeal), are exempt under sub-sec. 23, sec. 6, R. S. O. c. 180, as I find that the appellant is a minister of religion in actual connection with the Presbyterian Church in Canada, and doing duty as such minister.

I think, therefore, that the appeal must be allowed and the assessment struck out, and the clerk shall forthwith alter and amend the roll accordingly. Each party to pay their own costs. *Appeal allowed.*

COUNTY COURT, LEEDS AND GRENVILLE.

RE BROCKVILLE (DOMINION) ELECTION, 1882.

Recount of Ballot.

At the last Dominion Election for the Electoral District of Brockville, the candidates were W. H. Comstock and John F. Wood. Mr. Wood's majority, according to the returns of the Deputy Returning Officers, was four.

Mr. Comstock applied for a re-count, which was held at Brockville on the 3rd and 4th July, 1882, before His Honour H. S. McDonald, County Judge of Leeds and Grenville. A. N. Richards, Q.C., C. F. Fraser, Q.C., and E. J. Reynolds, appeared for applicant Joseph Deacon, and G. R. Webster appeared for the respondent, who was also present in person.

In several cases, and at different polls, the cross had been made for each candidate with a coloured pencil, and apparently not that provided in the polling place.

Held, that the votes were good and properly counted for each.

In a ballot rejected in No. 3, Elizabethtown, a cross appeared in the compartment above that containing Comstock's name, and a cross was properly marked after Wood's name. Deacon contended the vote should be allowed to Wood, as the other cross was not in Comstock's compartment. During the course of the argument, it was discovered that the upper cross was caused by the impression made by the one written after Woods' name, when the ballot was folded. Possibly the voter had wet the pencil before using it.

Held, a good vote for Wood, and added to his count.

On a ballot rejected at No. 1 Division North Ward of Brockville, and on one allowed at No. 3 in same ward, and on four allowed at No. 3 Kitley, the initials of the Deputy Returning Officer did not appear. Of these, the one rejected, and three of those counted were for Comstock, and the other two for Wood. Fraser cited 12 Law Journal, 116. Deacon cited 14 Law Journal 322, and contended that at any rate the one rejected by the Deputy Returning Officer must remain so, as he had clearly disavowed its being a paper supplied by him to the voter.

Held, that if these ballots were really those furnished by the Deputy Returning Officers to the respective voters, it was the duty of the latter to see that the initials were upon them (*vide* 3rd clause of directions for guidance of voters), and by using them without the initials, they aided the non-compliance with the provisions of the Act. *Held*, that the rejected ballot was properly so, and that all the others ought to have been. Accordingly three votes were struck off Comstock, and two off Wood.

In No. 2 Kitley, a ballot for Wood, properly marked, but with the counterfoil attached, had been allowed by the Deputy Returning Officer.

Held, properly so; for the voter was not in any manner to blame for the omission of duty after he had done his part, and handed in his ballot: see *South Grenville Case*, 14 Law Journal, p. 322. In the ballot papers used, in addition to the lines given in the Form I. to the Act, a printed line appeared in many, perhaps all, a little above the perforated line. Taking this printed line as the lower boundary of Wood's compartment, he and Comstock were allowed equal spaces.

The following may be taken as a specimen of the ballot paper.

ELECTION FOR THE ELECTORAL DISTRICT OF BROCKVILLE, JUNE 20th, 1882.

COMSTOCK.

I. William Henry Comstock, of the Town of Brockville, in the County of Leeds, Manufacturer.

WOOD.

II. John Fisher Wood, of the Town of Brockville, in the County of Leeds, Barrister-at-Law.

X

.....

Several votes for Wood (whose name was the lower one in the paper), had been marked above the perforated line, and below this printed line. This had occurred at several polling places. The X near the foot of the specimen ballot above may be considered a sample. In some cases these votes had been rejected, and in others allowed.

Deacon contended that the lower printed line ought not to have been upon the paper, and

should be treated as a printer's interpolation; that the perforated line was the lower boundary of Wood's compartment; that putting such an unauthorized line in the compartment, was to a certain extent setting a trap to catch voters. He referred to the directions for the guidance of voters, and cited 27th and 80th sections of the Act, and referred to Form I.

Richards contended such votes should be rejected. That the compartments as lined, were equal. That it would be unfair to allow Wood the larger space which he would have if the compartment ran to the perforated line. He cited 80th sections of the Act.

Held, that Mr. Deacon's contention was correct: that the lower line was an interpolation in Wood's compartment, and that he was entitled to all the space to the perforated line; in other words, the perforated line at the top of the counterfoil should (following the form given by the statute), be the lower line of Wood's compartment. The votes rejected (two), were added to his count, and those allowed by certain Deputy Returning Officers remained so.

There were other objections of various kinds urged, but they were mostly cases in which the question was as to ability to identify, or as to the improper formation of a cross. Some of these votes were allowed, others not.

One ballot for Wood had been allowed to Comstock, and one allowed Comstock was missing. The result of the recount was to add five to Comstock, and take ten off; to add four to Wood, and take eight off. This increased Wood's majority by one vote.

RECENT ENGLISH PRACTICE CASES.

BROWN V. NORTH.

Imp. O. 16, r. 8—Ont. r. 97—Married woman suing separately—Security for costs.

When a married woman applies to a Court or Judge for leave to sue without her husband, and without a next friend, under the above order, she should not be required to give security for costs if she possesses sufficient property available for the payment of costs in the event of her losing the suit.

[April 3, 1882,—C.A.L.R. 9 Q.B.D. 52.

BRETT, L.J.—We took time to consult with other members of the Court of Appeal in order that we might state what, in our view, is the general rule which should be followed in reference to a married woman giving security for costs under such an order as the one in question. We thought that the rule should be the same as that in the ordinary case of giving security for costs by an appellant; of course there may be special circumstances, and we do not attempt to lay down a hard and fast rule which never can be departed from, but the ordinary rule is this, that if it is stated, and not denied, that the appellant has no means to pay the costs of the respondent, then the appellant must give security for those costs. That being the general rule, subject to exceptions in certain cases, the Court sees no reason why it should be departed from in the case of a married woman . . . As a general rule, if she has no available means, and will go to law, she must give security for costs. But if she has available means to pay costs if she loses, the Court cannot see any reason for adopting a different rule in her case to that which is followed in the ordinary case, and she ought not, the Court thinks, in that case be obliged to give security for costs.

HOLKER, L.J., concurred.

[NOTE.—*So far as this decision rests on the analogy of the practice in the case of appellants, R. S. O. c. 38, sect. 26, would seem to prevent the application of the analogy here. The Imp. and Ont. rules are, as regards the matter of this case, identical.*]

VICARY V. THE GREAT NORTHERN RY. CO.

Imp. O. 55, r. 1—Ont. rule 428.

The discretion of the Court as to costs extends to the costs to be incurred in any future proceeding.

[June 26, 1882,—Q.B.D., L.R. 9 Q.B.D. 168.

DENMAN, J.—By Order 55, r. 1, (Ont. rule 428) the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court, and I think it is a reasonable construction of this rule that the Court should have the power, without waiting for the end of the proceedings, to order that the costs of any step in the proceedings should, in any event, be borne by one or other of the parties, having regard to his conduct in any previous matter which had occurred before that event. But even if the

power be not conferred by Imp. O. 55, r. 1, (Ont. rule 428) I think a discretionary power of the same character existed at the date of the Judicature Act, and which was not affected by the Act or the rules made under it.

POLLOCK, B., concurred.

[NOTE.—*The Imp. and Ont. rules are identical.*]

EYNDE V. GOULD.

Imp. O. 44, r. 2; O. 53 r. 3—Ont. rule 365, 406.

Under above rule a motion for an attachment can only be on notice; and the Court cannot grant a rule *nisi*, dispensing with notice.

[May 1, 1882,—Q.B.D., L.R. 9 Q.B.D. 335.

T. W. Chitty moved for an attachment against a person for removing goods out of the hands of the sheriff, which had been taken by him under a writ of *fi. fa.* He asked for a rule *nisi*, as was granted in *Jupp* v. *Cooper*, L. R. 5 C.P.D. 26, inasmuch as no notice of motion had been given. He argued that the service of a rule *nisi* would operate as a notice. He also referred to Imp. O. 53, r. 3, (Ont. rule 406) urging that in this case serious mischief was suggested as likely to result from delay.

LORD COLERIDGE, C.J.—The words of Imp. O. 44, r. 2, (Ont. rule 365) are perfectly plain and unambiguous, and if they are to be taken to mean what they say, a rule for an attachment cannot be entertained unless notice has been given. No notice having been given here, this rule must be refused.

GROVE, J., concurred.

Rule refused.

[NOTE.—*The Imp. and Ont. rules are identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Divisional Court.] [Sept. 7.

ESSERY V. COURT PRIDE.

Provident Society—Expulsion of member—R. S. O., c. 167.

In the case of charitable and provident societies incorporated under the statute empowering them to provide for the discipline and management of their own affairs, one of the members should not be allowed to litigate his grievances with the society in the courts until he has exhausted every possible means of redress outside of the courts, according to the principle laid down in *Field* v. *Court Hope*, 26 Gr. 475.

All that is required in these cases is to see that the party complaining is a member of the society, and that the matter in dispute is one relating to the internal economy of the organization, and provided for by its rules and regulations. In such a case the jurisdiction of the courts is practically ousted until all expedients furnished by the conventional code of laws have been resorted to.

Held, in this case, inasmuch as it appeared that the plaintiff did not follow the rules prescribed by his society, and exhaust all the remedies provided thereby, but prematurely filed the present bill to restrain the society from expelling him, the decree of the court below dismissing the bill should be affirmed with costs.

R. M. Meredith for the appellants.

W. P. R Street for the respondents.

Divisional Court.] [Sept. 7.

O'DONOHOE V. WHITBY.

Solicitors — Negligence — Costs — Sale under mortgage—Notice—R. S. O. c. 104.

On a proper construction of the power of sale contained in the Act respecting short forms of Mortgages, R. S. O., c. 104, alternative modes of service of notice of the intention to exercise

the power are permitted. The service may be, (i) personal; (ii) at the mortgagor's usual place of residence within the province; or (iii) at his last place of residence within the province. It cannot be the intention of the Act that service may not be effected at the mortgagor's usual or last place of residence, unless he is out of the province, because that would be to import a restriction into the statute which is not fairly deducible from its language.

Held also (reversing the judgment of PROUDFOOT, J.), that even presuming the proper construction of the statute to be as last mentioned, yet the wording of the statute is doubtful, and it by no means follows that there was any want of skill, or any negligence on the part of a solicitor who failed to inform his client that service of the said notice at the mortgagor's usual or last place of residence within the province, would be useless if the mortgagor was still in the province. If the solicitor, taking a contrary view of the meaning of the statute, told his client that in order to exercise the power of sale, notice had to be served at the usual or last place of residence of the mortgagor in Ontario, he did all that in law he was required to do. If he went further, as in this case, and pursued investigations as to where that place was, then it becomes a question of evidence whether he shewed such negligence in the discharge of this self-assumed duty as should disentitle him to tax costs as against his client. In the present case no such negligence was made apparent.

Held further, where the services of a solicitor are rendered at the instance of the client with the like knowledge of the matters of fact as the the solicitor, the onus is on the client to establish negligence, ignorance. or want of skill, by reason of which alone and entirely the services have been utterly worthless.

Moss, Q.C., for appellant.
Fitzgerald for respondent.

Divisional Court.] [Sept. 7.

FRASER v. THE GORE DISTRICT INS. CO.

Insurance — Payment of premium — Waiver — Onus.

This was an action brought to recover the amount secured by a certain policy of fire insurance, which the plaintiff alleged had been duly renewed so as to cover the date of the occurrence of the loss. The defendant company was an Ontario company, and the agent with whom the dealing as to insurance took place, was a local agent of the company. The policy ran out on June 1st in each year, unless renewed. The fire took place in September, 1881. There was no payment of cash at the end of the year preceding that in which the fire occurred, or afterwards, but the following arrangement was made between the company's agent and the husband of insured: In April, 1881, the husband undertook to make a set of harness for the agent, who agreed to pay him for the harness partly in cash, and to pay the balance to the insurance company as the consideration of the renewal receipt. The agent expected to get the harness by June, 1881, but did not get it till the following October or November after the fire. Nevertheless the agent, having received a renewal receipt from the company, gave it to the plaintiff on August 3rd, 1881. No entry of the transaction was to be found in the books of either party to it. The agent did not pursue his usual course of debiting the company with the premium as if paid by him or payable by him, and failed to make a return of this policy as renewed in a statement sent by him to the head office, in August, 1881, after he had delivered the renewal receipt to the plaintiff. After the fire the agent sent forward the amount for the premium, which the company forthwith returned, aud repudiated liability.

Held (affirming the judgment of PATTERSON, J., who had non-suited the plaintiff), that the above was an invalid transaction, inasmuch as no course of dealing was proved which would tend to mislead the plaintiff or work an estoppel against the company, and no evidence was offered that the company knew of their agent receiving anything else but money for the payment of premiums.

Held also, if payment is made out of the usual course, it lies on the person who sets up the exceptional mode of payment to shew the authority of the agent to bind his principal. Any doubt that exists as to the sufficiency of the payment should be given against the person dealing with the agent, as he always has the power of protecting himself by applying at head-quarters.

Maclennan, Q.C., for the plaintiff.
Moss, Q.C., for the defendant.

Divisional Court.] [Sept. 7.

ROBERTS v. HALL.

Adoption of child—Promise to make a will.

This was an appeal from the judgment of FERGUSON, J., noted *supra* p. 177, where the facts of the case are stated.

Held (reversing the judgment of FERGUSON, J.), (i) The question was not now whether the contract originally would have been enforceable by the court in specie; and inasmuch as the engagement had been faithfully performed by the father and the child on their part, any objection that there was in the agreement itself a want of mutuality could not be allowed to prevail at this stage. The agreement having so far been acted upon as to have altered the status of the plaintiff, and that by the act of the Halls, a new equity had arisen, and the defendants must be precluded from disputing with the plaintiff their liability to perform their part of the agreement. For where the plaintiff has fully performed his part, then if the court can enforce in specie the part which remains to be done by the defendant, it will do so, unless the agreement in question be illegal and contrary to public policy.

(ii) The agreement now in question is not illegal as against public policy, or otherwise. For although the general rule is indisputable that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which as a parent the law casts upon him, is illegal and contrary to public policy, yet this only means that the court will not allow or assist a father to make an arrangement which will preclude him from acting according to his judgment and discretion in the most advantageous manner for the welfare of the child. Therefore, in those exceptional cases in which the control of the father may be injurious to the child, or where it is for the advantage of the child that the parental superintendence should not exist, or where the father agrees to *forisfamiliate* the child out of regard for his welfare, in view of benefits, pecuniary or otherwiss, bestowed or expected, the "principal is inverted," and such a contract may be justified. And the facts shewed the present to be one of these exceptional cases. The benefit of the child is the foundation of both the rule and the exception. And although, in such cases, the court requires to be satisfied that there are solid considerations for the infant to be taken into account, and not merely expectations, before coming between the parent and the child, yet in cases where the father is not seeking to regain the custody of the child, this is not a necessary element in determining whether such an arrangement is contrary to public policy.

(iii) *Held*, therefore, on the whole case, the plaintiff was entitled to a declaration that the property, real and personal, of which the deceased died possessed is impressed with a trust in her favour.

Dictum of Court of Appeal in *Alderson* v. *Maddison*, L. R. 7 Q. B. D. 181, dissented from.

(iv) *Held* further (affirming the judgment of FERGUSON, J., on this point), that the plaintiff had the right of suit in her own name.

W. Cassels for the the plaintiff.

Robb for the defendant.

Osler, J.] [Sept. 5.

THE TOWNSHIP OF PEMBROKE v. CANADA CENTRAL RAIIWAY.

Railways—31 Vict. c. 68, sec. 10 D—Municipal law—Acquiescence by corporation—R. S. O. c. 174, sec. 277.

Suit by the corporation of the Township of Pembroke seeking for a *mandamus*, commanding the defendants to remove their railway from off a certain highway in the unincorporated village of Campbelltown, and for an injunction, on the ground that the defendants had constructed their railway along the said highway without the leave of the plaintiff, and contrary to the provisions of the Railway Act of 1868, 31 Vict. c. 68, sec. 10 D., to which Act the defendants were subject.

Held, on the evidence, that the corporation had sufficiently granted leave to the company to carry their railway along the highway, by a certain resolution passed by them in 1876, to the effect that, "The railway company be notified to fill up the deep ditch on both sides of the tract on the street, and have proper crossings put down at each cross street." The court held that this amounted to an admission that the defendants were lawfully in occupation of the street, coupled with a request to put it into better condition.

All that the Railway Acts require is that "leave shall be obtained" from the proper municipal or local authorities before a railway is carried along an existing highway. Such leave may be granted at any time, whether before, during, or after the construction of the railway. Although, moreover, the most proper way to grant such leave would be by by-law, yet it may also be granted by resolution. R. S. O. c. 174, sec. 277, enacting that the powers of Township Councils shall be exercised by by-law, must be construed as referring only to the exercise of powers of the Council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature.

Held also, that apart from this, the plaintiffs had acquiesced in the acts complained of, and a corporation may be bound by acquiescence as an individual may. The plaintiffs had power to grant or refuse leave to do what they were now complaining of, and the evidence shewed that they stood by while the railway was being built, on the assumption that it was assented to by them, and they had allowed it to be operated for four or five years without objection; moreover, by the resolution above referred to, they had recognised what had been done and procured further expenditure by the defendants.

Moss, Q.C., (*W. R. White* with him) for the plaintiff.

J. H. Metcalf for the defendants.

PRACTICE.

Divisional Court.] [Sept. 9

MCTIERNAN V. FRASER.

Appeal—Divisional Court—Court of Appeal—O. J. A.

An appeal from the report of the Master at Ottawa was decided by PROUDFOOT, J., on 29th June, 1882. The cause was made and decree made before the O. J. A. came into operation. The plaintiff then appealed to the Divisional Court.

Held, that the cause was not distinguishable from *Re Galena*, 46 U. C. R. Under the O. J. A. the appeal should have been to the Court of Appeal and not to the Divisional Court.

S. H. Blake, Q.C., for appellant.

Bethune, Q.C., contra.

The Master in Chambers.] [Sept. 8.

WALLACE V. WHALEY.

Reference—Powers of Local Masters—O. J. A. secs. 47 and 48.

The following order of reference was made at the trial of the cause: "Upon hearing the solicitors on both sides, and by their consent, I order that all matters in difference in this cause between the parties in this cause be referred to the certificate of the local Master, etc., with all powers, as to certifying and amending, of a Judge of the High Court, and that the costs of the suit and of the reference be in the discretion of the local Master."

The Master found on every issue between the parties, and exercised his discretion as to the costs, and concluded his report as follows, "All which I humbly certify and submit to this honorable Court," but the report did not contain any order on any party to pay according to the findings or the costs.

Upon this report the defendant signed judgment, and this was a motion by the plaintiff to set the same aside.

Held, that the signing judgment was proper, as the Master had acted as an arbitrator under the Common Law Procedure Act, whose decision was final, and not as an official of the Court under secs. 47 or 48, O. J. A.

Shepley for motion.

Clement, contra.

Burton, J.] [Sept. 9.

INTERCOLONIAL BRIDGE CO. V. SOUTHERN RAILWAY.

Motion to disallow a bond filed by the defendants (appellants), to secure the amount found due the plaintiffs, pending an appeal to the Privy Council. The bond was in the form given in Rule 36, O. J. A., with some further recitals.

It was objected that the condition of the obligation ought to read "do and shall effectually prosecute such appeal *and* pay," etc., instead of "*or* pay," as given in the form, and also that the condition should be to pay "what had been found due by the Court appealed from," instead of "such costs and damages as shall be awarded."

BURTON, J., held that *or* was the correct word to use, and that "effectually prosecute" meant "successfully prosecute," but disallowed the bond on the second objection, holding that the proper condition must be found based upon the language in R. S. O. cap. 38, sec. 27. sub-sec. 4.

Liberty was given to file new security.

Cassels for plaintiffs (respondents).

Crooks, contra.

SELECTIONS.

NEW ENGLISH MARRIED WOMEN'S PROPERTY ACT.

Quietly, and almost unobserved by the mass of the persons whom it will affect, a Bill fraught with no small consequence to nearly half the community has been passing through Parliament. The Married Women's Property Bill was brought from the Lords as long ago as May 22. In the Commons it was blocked by the tactics of Mr. Warton. But it has been triumphant even over him, and was read a third time on Tuesday, and the amendments of the Commons were agreed to yesterday by the Lords. More than once in other years the measure seemed on the point of passing, and yet was at the last moment shunted, owing to those vague but potent reasons known as "the state of public business." The Bill has not been advanced to its final stage without deliberation. It has been subjected to the scrutiny of three Select Committees; it has been amended in the Lords; and if the authors and friends of the Bill have proceeded upon wrong lines, they have done so with malice prepense. The policy of the measure may be good or bad, but there can be no mistake about the magnitude of the change which it will introduce. It is intended to amend and consolidate the Acts of 1870 and 1874; but it is much more than a consolidation Bill. The first section shows the sweeping character of the alterations which it may make in the economy of many English households. When the Bill becomes law, a married woman will be capable of acquiring, holding and disposing, by will or otherwise, of real or personal property as her separate estate, just as if she was single. The intervention of trustees and the rest of the apparatus of settlements will not be requisite. At Common Law—and with some modifications the same still holds good—a married woman could not enter into any contracts; if she went through the form of doing so, the result was null. She was more helpless in this respect than infants and lunatics, the two classes in whose company she habitually figured in English law. Everything which she acquired, no matter in what manner, went to her husband, and at death to his personal representatives. If she were injured in a railway accident and recovered damages, she might see the compensation spent by her husband as he in his wisdom or folly thought fit. A married woman might work hard and earn money as an artist or washerwoman. Her receipt for the price of her labour was no receipt at all, and the person who trusted to it and paid her might have to do so twice over. In several respects this has already been altered, and greater changes are proposed. Under this Bill every married woman will be capable of "entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her." Hereafter the damages which she recovers for a broken leg or injured reputation will be her separate property. An important change will be effected by the adoption of the clause which proposes to enact that every contract into which a married woman enters will be deemed to be a contract binding her separate estate, unless the contrary be shown. A leading presumption of law will thus apparently be altered at a stroke. Of still more consequence is the proposal that in the case of any woman married after the measure comes into operation, she shall hold as her separate estate and be free to dispose of, without limitations as to the amount, "all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage." Thus at a stroke goes the prime necessity for settlements. Not content with making this measure prospective, the framers of it boldly go on to say, "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid." Compared with these clauses, most of the others are tame and commonplace. But it is perhaps worth while to note that the Bill proposes to give to every married woman the same civil and criminal remedies against all persons, and, subject to certain exceptions, "including her husband," for the protection and security of her separate property as if it belonged to a *feme sole*; that, conversely, a wife is to be liable to criminal proceedings by her husband, if she deals improperly with his property; and that if she happens to carry on trade separately from her husband, she may be made bankrupt.

An exaggerated conception of the area covered by the measure would be got if we lost sight of a few substantial qualifications which undo not a little of the effect of the most salient clauses of the Bill. It is not intended, for instance, to interfere with existing settlements. There is, too, no proposal to withdraw or curtail the power of making future settlements, unless so far as it is necessary to give creditors the same rights over the property of a married woman who engages in trade, and is unable to pay her debts, as they now possess in the case of a bankrupt trader. To avert an obvious scandal, which would be produced by the adoption of one of the clauses without check or limit, the framers of the Bill say that as to any property, "no criminal proceedings shall be taken by any wife against her husband by virtue of this Act, while they are living together." Nevertheless this legislation marks a notable advance, and heralds some curious social changes. In 1870 the Legislature had its eye directed almost solely to the hardship, which was undeniable, of permitting a husband, who might be wholly remiss in his duties as breadwinner of the family, to sweep away all the earnings made by his wife's pen, pencil, or needle. With general approbation Parliament then took measures to secure the remuneration gained by married women in separate trades, or in the exercise of literary, artistic, or scientific skill. In 1875, Parliament returned to the subject, but only to touch it lightly and perfunctorily. The new measure is more important than either of its predecessors. Unlike them, it is based upon a principle, and one radically different from the principle which has hitherto been supreme in regard to married women's property.

The presumption always has hitherto been that everything which a woman had at marriage, or which she afterwards obtained, passed to her husband. For centuries that principle has been applied, almost without mitigation, to the poor, and, indeed, to the greater part of the middle classes, who have not family solicitors at their elbows, and are not much concerned about the transmission of property. Until the measures which we have named, and others designed to protect the earnings of women who were deserted by their husbands, were adopted, the Common Law was, in fact, the marriage law of the poor. For the rich there was another law. Men whose daughters were entitled to property took care, as a rule, to settle it to their separate use; and accordingly the well-to-do classes of the community know little of the rigour of the the rules which we have stated. Under this Bill the wife of a costermonger will have, in effect, an Act of Parliament settlement. An important legal presumption will be altered, and we shall not have to wait long to observe the result. Those who do not marry without settlements of some sort will continue in the same course; but the millions who do will live under a law which gives a *feme covert* much the same rights as a *feme sole*. Other consequences, perhaps more momentous, are latent in the measure, which will leave little of the Common Law intact. It probably portends indirect social effects, much greater than the disposition of property, and it may in the end pulverize some ideas which have been the basis of English life. Measures which affect the family economy are apt to be "epoch making;" and probably when the most talked of Bills of the Session are clean forgotten this obscure measure may be bearing fruit.—*Times*, August 17.

LAW STUDENTS' DEPARTMENT

EXAMINATION OF STUDENTS BEFORE EASTER TERM, 1882.

EXAMINATION FOR CALL.

Pollock on Contracts—Best on Evidence.

1. Indicate by examples the kind of conduct which can be relied on as constituting a tacit acceptance of a contract.

2. To what extent can an agent personally enforce contracts entered into by him on behalf of his principal? Answer fully.

3. Under what circumstances will representations not fraudulent affect the validity of a contract? Answer fully.

4. In case of a solicitor purchasing or obtaining a benefit from his client, what is required of the solicitor in order that the contract may be upheld?

5. Write short notes on the privilege of witnesses in not answering questions tending to criminate themselves.

6. Mention the different modes of proof of handwriting by resemblance.

7. To what extent are communications between solicitor and client privileged from being given in evidence? Answer fully.

8. Define a promissory note, and write brief notes on the question of its negotiability.

9. A. on good consideration transfers a bill payable to his order to B. without indorsing it. What right has B. in regard to the bill so transferred?

10. To what extent is a banker liable for the payment of a forged bill? Illustrate your answer by reference to a decided case.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

During this term the following gentlemen were called to the Bar, namely :—

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers Lewis, William Steers. Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely :—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely :—

Graduates—Archibald Gilchrist Campbell, Alex-W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William, John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Rielly. Articled Clerks—E. Considine, D. A. Cameron.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

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DIARY FOR SEPTEMBER.

1. Sun... *17th Sunday after Trinity.*
2. Mon.. Co. Ct. Term (ex. York) begins. Co. Ct. sitt. without jury (ex. York) begin.
3. Tue... First edition English Bible printed, 1535.
7. Sat. .. County Court Term (except York) ends.
8. Sun... *18th Sunday after Trinity.* Harrison, C.J., sworn in, 1875.
9. Mon.. County Court Term for York begins.
11. Wed.. Guy Carleton, Governor of Canada, 1774.
12. Thurs. Lord Lyndhurst died, 1863.
13. Fri.... Battle of Queenston, 1812.
15. Sun... *19th Sunday after Trinity.*

TORONTO, OCT. 1, 1882.

WE are gratified to see that the article on "Sunday Laws—Works of Necessity," published in these columns on May 15th, has been reprinted in full, both by the *Irish Law Times* and by the *Central Law Journal.* Another article from the same valued contributor appeared in our last number, on the "Value of Children." Though the name of the writer is not subscribed to these two articles, probably our readers in Ontario will have little difficulty in conjecturing who he is.

WE learn from the *Times* that the French Chambers, in their last session, passed a short Act to abolish religious oaths in Courts of Justice. It appears that this was done directly in the teeth of judicial opinion; and it seems even a more dangerous experiment in France than it would be with us, inasmuch as French law has never allowed a witness to be silent on the ground that his answers might criminate him, and therefore it is all the more necessary that moral pressure should be brought to bear on deponents. It is to be hoped for their own sake that French witnesses will remember that though religious oaths have been abolished, the very stringent penalties which their law imposes on perjury still exist. Articles 361-366 of sect. 7, on Crimes of the Code Napoleon decree that perjury in an Assize Court is to be punished by penal servitude for not less than five years; but if a witness by committing perjury, has caused an innocent man to be convicted, he shall suffer whatever punishment the convict had been sentenced to undergo False swearing in a Correctional Court is punished by a *minimum* of two years imprisonment, and in a Police Court by a *minimum* of one year, with fines in both cases—deprivation of civil and political rights, and police surveillance at the discretion of the judges. These enactments remain in force to this day, except as regards the death penalty, which was eliminated in 1857, when capital offences were reduced to two—murder and arson. But perjury may still be punished in France by penal servitude for life.

WE publish to-day a well-written, temperate, and sensible letter from a correspondent, signing himself "Professional," on the subject of the present Law Course. It is undeniable that some practitioners—while they enforce, in a very exacting way, the duty on the part of those students who are articled to them to serve them faithfully during the period of these articles—forget to a large extent the reciprocal duty which exists on their part to teach and instruct the said students in the practice and profession of the law. At the same time we think our correspondent is a little unjust on this point, for it is not our experience that students find their masters-in-the-law unwilling to explain knotty points to them; and in one large office, to our certain

knowledge, the principals have, from time to time, spent considerable time and labour in delivering courses of lectures to those under articles to them. But the main point of our correspondent's letter remains unaffected. That the first year or two of the five year's course is at present, in a great degree, a pernicious waste of time, and in some degree compulsorily so, can scarcely be denied; and we cordially support our correspondent's contention that it would be more advantageous in every way that these two years should be devoted to going through a regular legal course at some legal college, where not only the elements of law and jurisprudence should be taught, but also such practical subjects as book-keeping, shorthand, etc. The Incorporated Law Society of London, to which we alluded in our last number, to some extent supplies such a want in England; but the establishment of a regular legal college, of much the same kind as our correspondent advocates, has, we believe, been for a long time a favourite scheme of Lord Selborne and other reformers. In our country, moreover, where general education ceases at a very early age, and men enter on the work of practical life much sooner than in the mother country, such an institution would be especially beneficial.

PROMISE TO MAKE A WILL—ROBERTS V. HALL.

THE judgment of the Divisional Court of the Chancery Division, or rather of the learned Chancellor, who delivered the principal judgment, is interesting among other things from its reference to a surprising *dictum* of the English Court of Appeal in the case of *Alderson* v. *Maddison*, L.R. 7 Q.B.D. 181, where Baggallay, L.J., delivering the judgment of the Court, says:—"It appears to us that to give the same effect to a man's promise and agreement to make a will as to a will made by him in pursuance of such promise or agreement, would be in direct contravention of the provisions of the statute."—(sc. of Wills.) In *Roberts* v. *Hall*, in the Court of first instance, Ferguson, J., referred in his judgment (*supra* 177) to this *dictum*, without expressing either approval or disapproval of it, as, indeed, it was unnecessary to do, inasmuch as, in his view of the case, the only agreement which he considered proved was contrary to public policy and illegal, and the Court, therefore, could not under any circumstance recognize it. In the Divisional Court, however, Boyd, C., in the judgment noted in our last number, says:—"The current of authorities enabling the Court to give effect in a proper case to an agreement to dispose of by will, or to leave a man's property at his death, is too well established to justify giving effect to the *dictum* to the contrary in *Alderson* v. *Maddison*, L.R. 7 Q.B.D. 181."

In *Roberts* v. *Hall*, the parents of the plaintiff, in 1846, entered into a written agreement with one Hall and his wife, whose representatives the plaintiffs were, by which they agreed to give their daughter, the plaintiff, then six years old, to Hall and his wife, who were to adopt her as their own child, and to make her sole heir to their property. The evidence showed that the adoption took place, and the plaintiff thenceforward and always discharged all the duties devolving upon her in the new family to the entire satisfaction of the deceased; that all that a child could do for a parent was fulfilled by the plaintiff down to the death of both Hall and his wife. Thus all that was engaged to be done on the part of the plaintiff and her own proper parents had been done. It also appeared that the adoption agreed upon between the parents of the plaintiff and the Halls, was unquestionably calculated to advance the interests of the plaintiff. Under these circumstances the Divisional Court held the agreement was not illegal as against public policy, and being executed, so far as the plaintiff was concerned, the Court could decree the performance of the rest of it *in specie*, although it could not

have decreed specific performance while the agreement was executory on both sides. They therefore declared the plaintiff entitled to a declaration that the property, real and personal, of which the Halls died possessed, was impressed with a trust in the plaintiff's favour.

In *Alderson* v. *Maddison*, in the Court of first instance, L. R. 5 Ex. D. 293, (1880), the judgment of Stephens, J., amounts to a sort of treatise on the subject of representations and promises as to making a will. In that case the finding of the jury at the Assizes had been that the defendant was induced to serve the father of the plaintiff, who claimed as heir-at-law, as his house-keeper without wages for many years, and to give up other prospects of establishment in life by a promise made by him to her to make a will leaving her a life estate in a certain farm if and when it became his property. Stephens, J., held that a contract to leave the plaintiff the life estate was established, and that there had been sufficient part performance on the part of the defendant to bar the Statute of Frauds, and gave judgment accordingly. The Court of Appeal (L.R. 7 Q.B.D. 174; S.C. 30 L.J.N.S. 466,) reversed this judgment on the ground that there had not been such a part performance as excluded the Statute, but it did not, except as regards the *dictum* referred to in *Roberts* v. *Hall* express dissent from the general principles of law laid down by Stephens, J., in the Court below, in respect to representations and promises to make a will in a certain way.

Stephens, J., says that the law on the subject is clear and consistent when "all the decisions" are considered, and is to this effect. A mere representation which is not a term in a contract, nor yet an estoppel, is not binding. He says, "There is a class of representations which have no legal effect. There are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences unless the person making the representation not only excites an expectation that it will be fulfilled but legally binds himself to fulfil it; in which case he must, as it seems to me, contract to fulfil it." Thus, after reviewing such cases as *Jorden* v. *Money*, 5 H.L.C. 185; *Maunsell* v. *Hedges*, 4 H.L.C. 1039; *Caton* v. *Caton*, L.R. 2 H.L. 127; and *Dashwood* v. *Jermyn*, L.R. 12 Ch. D. 776, in which representations, whether as to wills or other disposition of property, have been held not to be binding, he says:—"All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew, or ought to have known, to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations which induced the parties to whom they were made to take irrevocable steps; but in such case the decision turned on the question whether the declaration made was intended to form part of a contract or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration." On the other hand, after reviewing such well known cases as *Hammersley* v. *De Biel*, 12 Cl. and F. 45; *Prole* v. *Soady*, 2 Giff. 1; *Loffus* v. *Maw*, 3 Giff. 592; *Coverdale* v. *Eastwood*, L.R. 15 Eq. 121, he says that the result he draws from them is that whenever representations have been held to be binding the circumstances were such as to show that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding, one or more of these conditions were absent.

In our own Courts the cases on the subject of representations as to intentions of giving, devising or bequeathing, are entirely in accordance with the view of the law thus set out

by Stephen, J., in *Alderson* v. *Maddison*. Thus in *McKay* v. *McKay*, 15 Gr. 371, (1868), where the plaintiff rested his case on a verbal promise to give land to him, Mowat, V.C., says, p. 372:—"A mere intention, though expressed, as to a future disposition of a man's property, creates no legal obligation upon him to carry out that intention; and until the intended gift is made he may change his mind respecting it. But it is contended that there was more than an intention; that there was an agreement, and an agreement followed by possession." Again in *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410, (1873), in which Spragge, C., discusses *Hammersley* v. *De Biel*, *Jordan* v. *Money*, *Loffus* v. *Maw*, and *Maunsell* v. *Hedges*, he says:—"It cannot, I think, be held to be the law of this Court that it will aid a party only in cases where the representation is in regard to existing facts; though that seems to have been the opinion of the majority of the Law Lords in *Jordan* v. *Money*. The case seems to have gone off upon another point . . . On the other hand there may be a mere representation of intention. If such a representation be acted upon, it is acted upon in the expectation only of the continued good will of the party expressing such intention." He then quotes with approval, as does Stephens, J., in *Alderson* v. *Maddison*, the words of Lord Cranworth in *Maunsell* v. *Hedges*, where he says:—"A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representations being true, and who do act upon it, equity will bind him by such representation, treating it as a contract." And adds Spragge, C.:—"This I take to be the law of this Court. If a party engages to do a thing upon the faith of which another to whom it is communicated acts, it is treated as a contract, and is in fact a contract binding upon the party making it." And referring to the case before him, he says:—"The question then in this case I take to be, whether there was on the part of M. F., the father, an inducement held out to his son, T., amounting to an engagement, that if he would leave Brampton, where he was then residing, and remove with his family to the place where he, the father, was living, he would, by his will, leave to him the north halves of the lots." So in *Orr* v. *Orr*, 21 Gr., at p. 445. Blake, V.C., after referring to *Jordan* v. *Money*, *Maunsell* v. *White*, *Hammersley* v. *De Biel*, *Bold* v. *Hutchinson*, 3 Sm. and G. 407, and *Kay* v. *Crook*, 5 De. G. M. and G. 558, says:—"The deduction from these cases seems to be that where the representation is not of an existing fact, but of a mere intention, or where a promissor will not bind himself by a contract, but gives the other party to understand that he must rely solely on his honour for the fulfilment of his promise, the Court will not enforce the performance of the representation or promise. A representation which amounts to a mere expression of intention must be distinguished from a representation which amounts to an engagement." In accordance with this is also *Black* v. *Black*, 2 Er. and A. 419.

In such cases, therefore, the question would appear to be (1) whether there has been such an expression of intention as amounts to a contract; (2) whether, if so, and if the intention expressed relates to a future gift or devise of land, there has been such a part performance, or such a memorandum in writing as takes the case out of the Statute of Frauds. What amounts to such a part performance as will take a case of this kind out of the Statute of Frauds, opens too wide a subject to be entered on here, but it may be observed that it is the main question which was dealt with by the Court of Appeal in *Alderson* v. *Maddison*, when that case comes before it. As contended by counsel for the plaintiff in *Roberts* v. *Hall*, before the Divisional Court, there is nothing more con-

trary to the spirit of the Wills Act in an agreement to make a will, than there is contrary to the Acts relating to conveyances in an agreement to make a deed.

RECENT ENGLISH DECISIONS.

Continuing with the June number of L. R. 20 Ch. D., the next case which it appears expedient to notice is *Re Haven Gold Mining Co.*, p. 151.

COMPANY—WINDING UP—ONT. 41 VICT. C. 5, S. 4, SUBS. 5.

The Imp. Companies Act, 1862, s. 79, subs. 5, corresponds with our 41 Vict., c. 5, s. 4, subs. 5, and under both these enactments a Joint Stock Company may be wound up by the Court, "Whenever the Court is of opinion that it is just and equitable that the company should be wound up;" and the question was whether under the circumstances of this case, which the M. R. said was altogether novel in some of its salient features, the Court would order a winding up. The company in question had been formed, in the words of the prospectus, "for the purpose of acquiring and developing the property called the Haven Claim," in New Zealand; the mineral rights in which, the company had agreed to purchase from one Hance; but the memorandum of association contained general words enabling the company to purchase and work other mines in New Zealand. Some months after the registration of the company it was discovered that Hance had no good title to the claim. An extraordinary meeting of the company was then called by the directors, and the circumstances laid before it, but the shareholders, by a large majority, declined to wind up the company. The present petition for a winding up was then presented by two shareholders, on the grounds that the company had no title to the property mentioned in the memorandum and prospectus; that it was promoted solely for the interests of the promoters, and could not be carried on to the advantage or profit of the shareholders; and that many statements in the prospectus were untrue and misleading, and that the company was a mere bubble and sham. After the presenting of this petition the directors issued a circular to the shareholders stating their opinion that it was hopeless to go on with the undertaking, and advising a voluntary winding up; and at the same time they summoned an extraordinary meeting, at which, however, an overwhelming majority of the shareholders agreed that there was no necessity for a winding up, and expressed a wish that the Court of Chancery would dismiss the petition. Bacon, V.C., in the Court below, dismissed the petition, (i.) because the charges of fraud had not been made out, and "it is a well-established rule in this Court that if a man alleges a fraud practised by his opponent, and fails to prove it, his petition or application must be dismissed"; and (ii.) because of the resolution of the majority of the shareholders that the matter should go on, and that the directors should contiuue to accomplish, if they could, the objects of the company. "Upon the result of that meeting," he says, "in my opinion, every question of merits was wholly and completely concluded. The cases that have been referred to established, as the law of the Court, that when it is not impossible to carry on the project, when it is not absolutely clear that no good can ever come of the proceedings to accomplish the project, the Court will not interfere." The Court of Appeal, however, now over-ruled this decision, and made the usual winding up order. Jessel, M.R., says, p. 161:—"No doubt—and I have not forgotten it—there are general words in the memorandum and articles of association extending the right to work mineral property generally; but the object of the company, or the special object in the memorandum of association, is to work this gold mine; and the point which I have to consider is whether there is any mine at all as to which the company has a title or a contract which may eventuate in title." Having considered this question, he concludes thus:—"There is evi-

dence which is not only satisfactory to us, but was quite satisfactory to the directors—the very same evidence on which they advised the shareholders to act, but the shareholders, in general meeting, over-ruled their directors, and in December last refused to act upon it, and insisted upon going on with the company. Then is not this exactly the case pointed out by Lord Cairns in *Re Suburban Hotel Co.*, L.R. 2 Ch. 737,—'Where it is impossible to carry on the business for which the company was formed.' It seems to me it is exactly that case." Brett, L.J., in concurring, says:—"I think, therefore, the proposition is made out that there was a total absence of possession or right of possession by the company of the subject-matter which they were formed to work, and that there is no reasonable prospect of the company obtaining possession of such subject-matter. Under those circumstances it seems to me that the opinion of the majority of the shareholders is an unfounded opinion, and having come to that conclusion of fact, I think the opinion of that majority ought not to bind the minority." Lindley, L.J., says:—"It appears to me in substance to come to this, that it is proved by evidence upon which we must act, that the minority have established such a case as entitled them to say to the majority, 'The undertaking in which we all embarked is proved to be impossible to carry out; we decline to enter into any further speculation, or to join you in trying to get this property from other people and upon other terms." But as to the other ground of his judgment, the M.R. and Brett, L.J., agree with Bacon, V.C., the former saying:—"I agree that the mere fact of there being a fraudulent representation, or fraudulent representations, in the prospectus, is not sufficient. A company may, if they think fit, waive the fraud and complete the bargain and go on, or they may vary the bargain on the ground of fraud, and complete it with variations. As to that, the majority of the company in general meeting assembled are the best judges, but where the whole thing is gone the majority cannot bind the minority to enter into an entirely new speculation, and it never has been so held."

PROXIES—DEMANDING A POLL.

Before leaving this case a *dictum* of Bacon, V.C., at p. 157, as to the powers conferred by proxy papers, may be mentioned. He says:—"I found they, the proxies, authorize the persons to whom they are addressed, to go to the meeting and there to vote for the person granting the proxies. Can I read in that an authority to take so important a step as to demand a poll? Costs would attend such a proceeding. The proxy-maker would be astonished some day to be served with a bill of costs, and to be told he must pay it because he made somebody a proxy to vote for him."

MEMORANDUM OF ASSOCIATION—GENERAL WORDS.

Of the next case, *Re German Date Coffee Co.*, p. 169, it seems only necessary to say, after the above long review of the last case, that it is a case of a similar kind, decided on the same principle. In the Court of first instance, Kay, J., after reviewing the *Haven Gold Mining Co.* case, says:—"Therefore the law so far is established thus, that if the whole substratum of the company is gone, it is within sect. 79, 'just and equitable' that the company should be wound up." He then refers to the case of the *Langham Skating Rink Co.*, L.R. 5, Ch. D. 669, as showing where the line is to be drawn, and says:—"I think that shows very plainly where the line is to be drawn, and I take the line to be this, that where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being auxillary to that which the memorandum shows to be the main purpose, and if the main purpose fails and fails altogether, then, within the language of Lord Cairns in the *Suburban Hotel Co.* case, and within the de-

cision in *Baring* v. *Dix*, 1 Cox 213, the substratum of the association fails." The Court of Appeal in short judgments affirming the decision of Kay, J., Baggallay, L.J., and Lindley, L.J., echo his words as to general words in a memorandum of associaton of a company; and the former says, also,—"It appears to me that the principle involved in the decision of *In Re Suburban Hotel Co.*, by Lord Cairns, amounts to this, that if you have proof of the impossibility of carrying on the business contemplated by the company at the time of its formation, that is a sufficient ground for winding up the company."

MORTGAGE—POWER OF SALE—UNDERVALUE.

The next case which it seems necessary to notice is *Warner* v. *Jacob*, p. 220, the purport of which is shown in the following passage of the judgment of Kay, J., when, after reviewing the cases, he says:—"The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless, indeed, the price is so low as in itself to be evidence of fraud."

BILL OF EXCHANGE—ACCEPTED BUT NOT SIGNED BY DRAWER.

The next case, and the last in this number of the Chancery Division, raises, in the words of Kay, J., "a question of some novelty." The question was whether a bill of exchange accepted for valuable consideration, with the drawer's name left blank, might be accepted by the drawer's name being added after the death of the acceptor. Kay, J., decided that it could, following a decision of the Vice-Chancellor in Ireland, in *Dutch* v. *O'Leary*, 5 Ir. L. Rep. (Eq.) 62, where it was held that the drawer's name might be filled in after the death of the acceptor.

Proceeding now to the July number of the Law Reports, they are found to consist of 7 App. Cas. p. 219-333; 8 Q.B.D. p. 1-136; 7 P.D. p. 101-117; and 20 Ch. D. p. 229-441.

TRADE-MARKS.

The first of these begin with a case, *Johnston* v. *Orr-Ewing*, which contains and illustrates several propositions of law relating to trade-marks. The suit was to restrain an infringement of the plaintiff's trade-mark, affixed by them to turkey red yarns, which they were in the habit of exporting to Aden and India. The question, therefore, to be decided was a question of fact, viz., as Lord Blackburn puts it:—"How far the defendants' trade-mark bears such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers. For," he adds, "the loss to the plaintiff's of the custom of an incautious purchaser is as great a damage as the loss of that of a cautious one. But in this case the plaintiff's judged it necessary to proceed without waiting till actual deceit was proved, and I think they judged rightly, for James, L.J., said, (13 Ch. D. 464), 'the very life of a trade-mark depends upon the promptitude with which it is vindicated;' and having done so they have to satisfy the Court that the similarity between the two tickets was such as to be calculated to mislead purchasers." And with reference to the trade-marks in this particular case Lord Selborne says:—"When this ticket (the defendants') and the plaintiff's are placed side by side the differences in detail between them are very apparent . . . But although the mere appearance of these two tickets could not lead any one to mistake one of them for the other, it might easily happen that they might both be taken by natives of Aden or of India unable to read and understand the English language, as equally symbolical of the plaintiff's goods. To such persons, or at least to many of them, even if they took notice of the differences be- the two labels, it might probably appear that these were only differences of ornamentation, posture, and other accessories, leaving the distinctive and characteristic symbol substan-

tially unchanged. Such variations might not unreasonably be supposed to have been made by the owners of the plaintiff's trade-mark themselves for reasons of their own." Later on he says:--"It is true that deception in fact, is not in this case proved; but there is a large body of trustworthy evidence to the effect that such deception would be liable and very likely to occur, at all events with the more ignorant class of consumers . . . Nor am I able to conceive any satisfactory explanation, under all the circumstances of this case, of the adoption by the defendants of that particular device . . . unless it was because they had a desire and intention to approach to the plaintiff's trade-mark as nearly as they possibly could. For such desire and intention no motive can be suggested except that of getting some part of the benefit of the goodwill and reputation of the plaintiff's trade." So, too, Lord Blackburn says, that as regards the defendants in this case their own conduct was evidence as against them, that the resemblance was calculated to deceive, for they were quite aware what the plaintiff's trademark was and the view taken of it by the Eastern buyers, and they were sending out yarns for the express purpose of competing with the plaintiff's. "I think," he adds, 'that the differences were so great that the defendants hoped that no Court would say that the use of the elephants (the principle feature in the trade-mark) could mislead." Lord Watson states the law in a general as follows:—"When a prominent and substantial part of a long and well known trademark, denoting the manufacture of a particular firm, appears as a prominent and substantial part of the new trade-mark of a rival, it seems reasonable to anticipate that the goods of the latter may be mistaken for, or sold as, the manufacture of the firm to which the older trade-mark belong . . . The reproduction of a prominent part of another merchant's trademark upon a new ticket does not *per se* establish that the latter was prepared by its owner with a view to deceive by himself selling, or by enabling others to sell, his goods as the manufacture of that other merchant. But no man, however honest his personal intentions, has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival . . . I am of opinion that, having regard to what they knew about the trade and trade-mark of the respondents (plaintiffs), it was eminently the duty of the appellants (defendants) in adopting a ticket of their own to avoid every feature of the older trade-mark which could by any possibility create the risk of their yarns being sold by some interested and unscrupulous dealers, as the respondents." The result, therefore, was that the plaintiff obtained his injunction.

Before leaving this case, which it has appeared desirable to note at considerable length, there are some dicta of Lord Selborne and Lord Blackburn to be noticed. At p. 227 Lord Selborne says: "Your Lordships are not called upon to decide whether a ticket, which was a rightful and *bona fide* trade-mark of the trader using it, could be excluded by injunction from particular markets, though unimpeachable everywhere else, merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent." At p. 228 Lord Selborne says: "Trade-marks have sometimes been likened to letters patents and sometimes to copyrights, from both of which they differ in may respects. And I think, to borrow a phrase used by Lord Ellenborough in *Waring* v. *Cox*, 1 Camp. 369, with reference to a different branch of the law, "Much confusion has arisen from similitudinary reasoning on the subject.'"

STATUTE OF LIMITATIONS—R. S. O. 108, SS. 4, 5.

The purport of the next case, *Pugh* v. *Heath*, p. 235, is best given in the following passage of Lord Cairn's judgment: "A legal mortgage of freehold land in 1856; no possession by

the mortgagee, and no payment of interest or principal to him, nor any acknowledgement of his title. Then in 1870—that is, after fourteen years—the mortgagee files a bill for foreclosure. He obtains a decree *nisi* in 1874, and a decree absolute in 1877. Then in 1878 he brings the present action, under that decree, to recover possession of the land. The appellants allege that the action is barred by the Statute of Limitations. Is this so? It was scarcely contended in the arguments of the appellants, and I do not think it could have been contended, that if instead of a legal mortgage the mortgagee had only an equitable mortgage or charge, and had within twenty years brought a suit of foreclosure and obtained a decree, he would not have been entitled to do so, and to hold and enforce that decree by every process which a Court of Equity could give. The Court is now not a Court of Law or a Court of Equity; it is a Court of complete jurisdiction; and if there were a variance between what, before the Judicature Act, a Court of Law and a Court of Equity would have done, the rule of the Court of Equity must now prevail. The argument of the appellant must therefore be that the possession of a legal mortgage, passing the legal estate as a pledge, put the mortgagee in a worse position than if he had not got it, and exposed him to the risk, as soon as twenty years from the date of the legal mortgage had expired, of forfeiture and losing the benefit of the suit and proceedings which he had in the meantime properly taken in the proper court to have himself adjudged, by reason of the mortgagor, the absolute owner of the land. This is an argument which appears to me to be as repugnant to reason as to justice; and I think, morover, that your Lordships could not admit it without acting in direct opposition to the spirit and principal of the case before Lord St. Leonards, of *Wrexon* v. *Vise*, 3 D. & War. 124, which has long been a governing authority on this subject. . . I must add, that if it were necessary I should have little doubt that the present action, being not an action of ejectment by a legal mortgagee to put himself in possession of land, which he is to hold as a pledge, subject to account and to all the infirmities of a mortgagee's title, but being an action by one who has become absolute owner of the land under a decree of the Court, is an action as to which the right to bring it must be taken to have accrued, within the meaning of sec. 2 of 3-4 Imp. Will. 4 c. 27 (R. S. O. c. 108, s. 4) of the date of that decree of the Court, and that sec. 3 (R. S. O. s. 5) of that Act, in defining when the right shall be deemed to have accrued, is not necessarily exhaustive or otherwise inconsistant with this view." Lords O'Hagan and Blackburn concurred, and thus the decision of the Court of Appeal (L. R. 6 Q. B. D, 345) was affirmed.

A. H. F. L.

REPORTS.

ONTARIO.

DIVISIONAL COURT—CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

MCTIERNAN V. FRAZER.

Jurisdiction of Divisional Court—Appeal from order of Judge made in Court.

A Divisional Court has no jurisdiction to entertain an appeal from an order of a judge, made in Court on motion, except by consent. *Re Galerno*, 46 Q. B. 379, followed.

[Sept. 7, 1882.—The Chancellor and Ferguson, J.

This cause had been set down to be heard before the Divisional Court by way of appeal from the order of PROUDFOOT, J., made in Court, on an appeal from the Master's report.

J. Bethune, Q.C., moved to strike the cause out of the list on the ground that the Divisional Court had no jurisdiction to entertain such an appeal. He referred to *Alford* v. *Ingram* before PROUDFOOT, J., 17th Oct. 1881, not reported. That was an application for leave to set the cause down to be heard before the Divisional Court by way of appeal from an order of a Judge, made in Court, or on appeal from a

Master's report, and was refused on the ground that the Divisional Court had no jurisdiction. A similar decision had been arrived at by the Q.B. Division in *Re Galerno*, 46 U. C. Q. B.

Rule 471 defines the jurisdiction of a Divisional Court, and appeals of this kind are not included in its provisions unless all parties consent.

S. H. Blake, Q.C., for plaintiff.—The Judicature Act and Rules have not taken away the right of appeal in this case. He referred to Taylor & Ewart, pp. 23, 25, 26, 27, 68, 75, 76, 79, 99; J. A. s. 9, ss. 2, 3, and to sect. 12, 52, which expressly continue the former practice also. *Ib.* secs. 29, 33, 35, 36, 39, and Rule 471. Rule 523 applies to "any judgment," and therefore must be intended to include all judgments, however pronounced.

This, moreover, was a suit pending before the Judicature Act, and is therefore to be governed by the former practice.—Taylor & Ewart, p. 404, Rule 494. The Decree in the cause was pronounced 5th May, 1880.

Bethune, Q.C., in reply Rule 494 is confined to proceedure and does not affect the question of jurisdiction.—*Cur. adv. vult.*

Sept. 8, 1882.—THE CHANCELLOR.—I cannot successfully distinguish this case from *Re Galerno*, and I think that the case must be struck out as not being appealable to a Divisional Court, with costs of the motion to strike out. It is contrary to the whole course of decision to say the Act allows this appeal—*Alport* v. *Ingram; Re Galerno; Trude* v. *Phœnix Ins. Co.*, 18 C. L. J. 54 The policy of the Act is not to encourage these intermediate appeals. Rule 494 does not apply, for the case is not pending in the sense of that order. What was pending was the proceeding in the Master's office. If the plaintiff is too late to carry the case to the Court of Appeal a special application for leave to appeal, notwithstanding the lapse of time, must be made.

FERGUSON, J.—I concur.

Cause struck out.

RECENT ENGLISH PRACTICE CASES.

TURNER v. HANCOCK.

Imp. J. A., sec. 49; O. 55, r. 1—Ont. J. A. sec. 32, Rule 428.

Cost of trustee—Appeal as to costs.

A trustee's costs cannot be said to be within the discretion of the Court, and are excepted out of the above section and rule.

Re Hoskins, L. R. 6 Ch. D. 281, disapproved.

Quære as to costs of trustee upon proceedings taken under Trustee Relief Act.

March 24, C. A.—L. R. 20 Ch. D. 303.

This action was brought for the purpose of carrying into effect the trusts of a certain settlement. It was tried before Bacon, V. C., who ordered that the trusts should be carried into effect, but refused to allow the trustee his costs. The trustee appealed, and the question was whether the appeal was allowable.

JESSEL, M. R.—It is clear, in my opinion, that this a case in which an appeal as to costs is allowable. The only excuse for the objection to the appeal is the recent case of *In re Hoskins*, L. R. 6 Ch. D. 281. In *Cotterell* v. *Stratton*, L. R. 8 Ch. D. 295, the claim of trustees for costs is rightly put on the same footing as that of mortgagees. (Reads Lord Selborne's words in that case, at p. 302.) But it is said that *In re Hoskins*, L. R. 6 Ch. D. 281, is a different effect. In that case James, L. J., is reported to have said, "The present is not a case where the appellant is *ex debito justitiæ* entitled to costs; the costs of a trustee being subject to the discretion of the Court." If we have to choose between the authority of Lord Selborne and Lord Justice James, I should be inclined to follow Lord Selborne's decision. But I go further, for I think it was not in the power of the Court in *In re Hoskins* to overrule the previous authorities; therefore I must take the decision in that case to have been founded on a mistaken view of the law, and to be subject to review. That being so, we come to the words of O. 55 (Ont. Rule 428), which are as follows:" (Reads it.) "That does not include the costs of a mortgagee or trustee, which I have shewn to be not in the discretion of the Court. *Farrow* v. *Austin*, L. R. Ch. D. 58 (*supra* p. 454), is directly in point. I think, therefore, that this appeal must be allowed to proceed.

COTTON, L. J.—I am of the same opinion. . . There is no doubt the Court has power to deprive

a trustee of his costs, but it only does so if something has occurred to deprive the trustee of his right to take them out of the fund, which is part of the contract under which he undertakes the trust. It has been attempted to confine that right to costs which are not costs of litigation; but *Cotterell* v. *Stratton* directly applies on this point.

LINDLEY, L. J.—I am of the same opinion. . . I should certainly have held so on principle, but I confess I am puzzled by *In re Hoskins*. I cannot understand that case; but I think we are bound by the earlier authorities, and ought to follow them in the present case.

COTTON, L. J.—I am inclined to think that if a trustee is deprived of his costs upon proceedings taken under the Trustee Relief Act, an appeal might be brought.

JESSEL, M. R.—I think so too.

[NOTE.—*The Imp. and Ont. sections and rules are identical respectively.*]

CURTIS V. SHEFFIELD.

Imp. O. 50—Ont. O. 44.

Revivor—Discretion of Court.

Where a great lapse of time has occurred, the right to revive is not absolute, but is subject to the discretion of the Court.

[Feb. 28, FRY, J.—L. R. 20 Ch. Div. 398.

FRY, J., (after referring to the circumstances of the case).—The question which I have to determine regards the discretion of this Court as to allowing a revivor under the circumstances, because undoubtedly the law is this, that, after the long lapse of time which has occurred here, the right to revive is not absolute, but is subject to the discretion of the Court, and in cases of long delay, gross negligence, laches, or change of the situation of the parties in consequences of a decree, the Court has declined to allow a revivor.

[NOTE.—*The Imp. and Ont. Orders are identical so far as affects this case.*]

BIDDER V. MCLEAN.

Imp. O. 28, r. 42—Ont. Rule 190.

Pleading—General demurrer.

When the facts set out in a statement of claim are long and complicated, so that the equity is not apparent, a general demurrer may be sufficient.

[Feb. 25, C. A.—L. R. 20 Ch. D. 512.

Action seeking a declaration of trust in respect of some railway stock. The statement of defence was long, the equity, if any, having to be collected from a complicated state of facts. The defendant had put in the following demurrer: "The defendant, F. McLean, demurs to the plaintiff's statement of claim, and says that the same is bad in law, on the ground that the facts alleged therein do not show any cause of action to which effect can be given by the Court as against the defendant, F. McLean, and on other grounds sufficient in law to sustain this demurrer."

The plaintiff moved on summons that the demurrer be set aside, "on the ground that it does not state specifically whether it is to the whole or to a part, and to what part, of the statement of claim, and that it does not state any ground in law for the demurrer, or only a frivolous ground of demurrer is stated."

Kay, J., refused the application. The plaintiff now appealed, and the question was whether the above general demurrer for want of equity, without stating any particular ground of demurrer, was sufficient in the face of Imp. O. 28, r. 2 (Ont. Rule 190).

JESSEL, M. R.—This is a case in which I must say that the plaintiff had some reason to expect a general demurrer for want of equity. . . I have not heard a suggestion in what better form the demurrer could have been put in such a case at the present. It is urged that if we hold this demurrer good in form, the direction of Imp. O. 28, r. 2 (Ont. Rule 190) will be nugatory; but that is not so. I do not think that it was intended to make it impossible to demur in a case where the statement of claim is so framed that the only way of meeting it is by the simple allegation that it shows no cause of action. In many cases a general demurrer like this would be improper, but I think it is not so in the present case.

BAGGALLAY, L. J.—In my opinion a general demurrer may be sufficient under the order, and I think that it is so in the present case. I do not mean to say that it generally is so.

LINDLEY, L. J.—Each case must be determined with reference to the form of the statement of claim. I think that in this cause a general demurrer is sufficient, though I do not say that it would be so generally.

[NOTE.—*The Imp. and Ont. Rules are virtually identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [Sept. 15.

RUMOHR V. MARK.

Execution—Mortgage of real estate—R. S. O. c. 66, ss. 27 and 28—Costs.

Where A. held, by assignment, a mortgage of the plaintiff B.'s on real estate, as collateral security for the payment of two promissory notes made to him by B., the assignment containing a provision that on due payment of the notes the mortgage should be re-assigned *to the plaintiff*, and where A. also held by assignment a judgment obtained by a third person against B., and under writs of *fi. fa.* against goods and lands, the sheriff, by A.'s connivance, seized the said mortgage and certain title deeds of the land as the property of B.; and A., though requested by B. so to do, refused to re-assign the said mortgage to a third person named by the plaintiff, unless the amount of the judgment was paid, as well as the amount due on the notes; and B. thereupon brought this suit, claiming re-assignment on payment of the notes.

Held, A. must re-assign to the plaintiff on payment of the notes, for the mortgage was not a mortgage "belonging to the person against whose effects the writ of *fi. fa.* has issued," under sec. 28 of R. S. O. c. 66, for B. had assigned it, and the sheriff, therefore, could not seize it and make its value, over and above the notes, available by sale or otherwise for the satisfaction of the writs.

When the legislature authorized the seizure of securities as chattels, it pointed out the mode in which the sheriff should realize upon them, namely, by suing on them, and he is not obliged to bring such suit until he is indemnified, as stated in the Act. This excludes the idea of the sheriff selling such securities as he would a chattel of the ordinary kind seized by him. Therefore it cannot be effectively argued that the mortgage in this case was made a chattel by virtue of sec. 28, so that B.'s interest in it could be seized and sold under sec. 27, *Smith* v. *Baring*, 10 U. C. C. P. 247 nowithstanding.

The plaintiff B. had required the defendant to assign the mortgage to a third party. The defendant at the trial said, "The sole reason why I refused to assign the mortgage was because they would not pay me the amount of the judgment."

Held, therefore, as to costs, the plaintiff by not making a proper tender and demand, and by asking the execution by the defendant of an assignment, such as the latter was not obliged to execute, forfeited his right to costs up to the time of filing the statement of defence; but looking at the reason given by the defendant as the sole reason why he did not comply with what the plaintiff required, and the way in which the action had been defended, the defendant should pay the plaintiff's costs incurred after the filing and delivery of the statement of defence.

Wilson for the plaintiff.

Douglas for the defendant.

Ferguson, J.] [Sept. 15.

MCCAUSLAND V. MCCALLUM.

Fixtures—Part of the freehold.

Certain counters were nailed to a scantling, which was placed in the wall of a drug store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected to the frame-work of the windows in such a way that the wainscotting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged.

Held, the counters were part of the freehold, and not chattel property.

Holland v. *Hodgson*, L. R. 7 C. P. 328, and *Keefer* v. *Merrill*, 6 Ont. App. 121, approved of.

Farley (with him *Doherty*) for the plaintiff.

Frazer for the defendant Selby.

Ferguson, J.] [Sept. 15.

PLUMB V. STEINHOFF.

Compensation for improvements—Unskilful survey—R. S. O. c. 51, ss. 29 and 30.

Damages may be assessed under the above section for improvements made by any defendant on land not his own in consequence of an unskilful survey, and that though the survey in question was made by a P. L. S., whom the defendant, merely as a private individual, employed to make it, and it is not a condition precedent to

the application of the section that the line or limit should have been established according to the Act respecting surveyors and the surveys of lands, R. S. O. 146.

Doe d. Gallagher v. *McConnell*, 6 O. S., 347, and *Mozur* v. *Keegan*, 13 U. C. C. P. 547, followed.

Moss, Q. C., (*Nesbitt* with him) for the plaintiff.

Atkinson for the defendant.

Ferguson, J.] [Sept. 15.

O'BRIEN v. O'BRIEN.

Gift from husband to wife, during coverture, of deposit certificate.

One James O'Brien, and Bridget O'Brien his wife, were the holders of a certain deposit certificate of the Bank of B. N. A. to the following purport: "Received from James O'B. and Bridget O'B. the sum of $2,800, for which we are accountable to either, with interest at current rate, etc." Three or four days before his death, James O'B. called his wife to his bedside, and in presence of another witness took the certificate and gave it her, saying she was to keep it for her own use, and unequivocally expressing an intention to make an absolute gift of the money to her.

Held, the husband having died, Bridget O'B. was entitled to obtain the money from the bank.

Donovan for the plaintiff.

S. H. Blake, Q.C., for the defendant Bridget O'Brien.

Ferguson, J.] [Sept. 15.

KLEIN v. THE UNION.

Insurance—Mortgage—Subrogation—Statutory Conditions—Company—Power of Manager to compromise claim.

The plaintiffs, who were in business as millers at Tavistock, under firm name of Klein, Kalbfleisch & Co., on February 21, 1879, gave a mortgage to the Union Loan Co. on their mill property. In this they covenanted to insure; and did insure in the Royal Insurance Co. by policy dated March 19, 1879, expiring March 1, 1880. On March 10, 1879, Klein retired from the business, conveying his interest to the other partners, subject to the above mortgage. The Union Loan having a standing arrangement to effect what policies they could with the Union Fire Insurance Co., and having on March 1, 1880, received no renewal receipt of the above policy, effected a policy with the Union Fire Insurance Co., in the name of the plaintiffs, on the said property. By paper attached, by way of indorsement to this latter policy, the loss, if any, was payable to the Union Loan Co., and the insurance as to the interest of the mortgagee, the Union Loan Co., was not to be invalidated by any act of the mortgagor. Then followed a subrogation clause. This endorsement was signed by the manager only. There was no written application to the Union Fire Insurance Co. for this policy; the policy in the Royal Insurance Co. was simply handed to them, and from this they drew their policy, which had the statutory conditions with variations. No representations were made to them in any other way. The premium on this policy in the Union Fire Insurance Co. was paid by the Union Loan Co., who collected it from the plaintiffs, but the plaintiffs took no part in effecting this policy. On March 14, 1881, the Union Loan Co. wrote a letter to the plaintiffs in which they represented this policy as being indisputable.

A fire occurred on the insured premises on April 22, 1881, and the Union Fire Insurance Co. paid the Union Loan Co. the amount of loss, who assigned the mortgage to the former. The evidence showed that at the time of effecting this policy there was a certain insurance on the property, and also certain mortgages of which the Union Fire Insurance Co. were not informed, and to which they never assented.

The plaintiffs in the present action, which was on this policy, claimed to have the mortgage discharged, and the balance of the insurance money paid to them; the Union Fire Insurance Co. counter-claimed for the amount due on the mortgage.

Held.—Plaintiffs could not recover as against the Union Fire Insurance Co., nor had they any remedy against the Union Loan Co.; and the Union Loan Co. were entitled to the usual judgment in mortgages cases on the counter-claim, and there should be no costs except the usual costs of an undefended mortgage case to the defendants, the Union Fire Insurance Co.

For (i.) Statutory Condition No. 1 was broken, inasmuch as the Union Fire Insurance Co. were

not notified that Klein had retired from the business, and that he had no insnrable interest in the property to be insured, and this was a fact material to the risk.

(ii.) Statutory Condition No. 1 was also broken by the existence of prior mortgages not mentioned to or assented to by the Union Fire Insurance Co.

(iii.) Statutory Condition No. 8 was broken since there was a prior insurance unnotified and unassented to, of which there was no evidence to show the Union Fire Insurance Co. had any notice till after the fire.

(iv.) By suing on the policy the plaintiffs adopted the act of the Loan Co. in obtaining it, and must recover on it as it was or not at all.

(v.) The fact that there was no written application could not affect the policy or the conditions.

(vi.) It was not proved that when the Union Loan Co. effected the policy they were themselves aware of the retirement of Klein.

(vii.) The letter of March 14, 1881, from the Union Loan Co. to the plaintiffs, saying that the policy was indisputable, was written long after the policy had been effected, and there was no evidence plaintiffs did, or abstained from doing, any act in consequence thereof.

(viii.) The agreement endorsed on the policy, and to be read in conjunction therewith, brought the case within the meaning of *Springfield Fire and Marine Ins. Co.* v. *Allen*, 43 N.Y. 389, and as there so here, the mortgage must be held to be a valid security in the hands of the insurers, the Union Fire Insurance Co.

The manager of the Union Fire Insurance Co. had, before the hearing of this cause, made an offer of compromise to the plaintiffs, which the latter duly accepted.

Held, this did not bind the Union Fire Insurance Co.; for it could not be assumed that the offer was made pursuant to authority from the directors. The plaintiffs were bound to prove such authority, and they had not done so.

S. H. Blake, Q.C., (*Wood* with him,) for the plaintiffs.

Bethune, Q.C., (*Hodgins* with him,) for the Insurance Co.

Rose, Q.C., (*McDonald* with him,) for the Loan Co.

Ferguson, J.] [Sept. 15.

SMITH v. RALEIGH.

Municipal corporation —Drainage by-law—R. S. S.O. c. 174, sec. 529—ultra vires—Mandatory injunction--Parties.

On a petition of a proper majority of the land-owning ratepayers interested therein, a by-law was passed on Sept. 25th, 1880, by the defendants, the corporation of the Township of Raleigh, for the construction of a certain drain, known as the Bachus drain. The by-law provided for the assessment of the land to be benefitted by the drain, the plaintiff being the owner of part thereof. The plaintiff now complained that the drain had not been completed, though a sufficient time had elapsed; that the defendants employed a certain portion of the moneys assessed on the plaintiff's land in the construction of another drain not mentioned in the petition, report of the P. L. S. made pursuant to the Act or the by-law aforesaid, and of no value to the plaintiff or the other petitioners for the construction of the Bachus drain; and he claimed an order compelling the defendants to complete the Bachus drain in accordance with the by-law and to pay the damages sustained by him, and an injunction against further misapplication of the moneys by the defendants, and an account of moneys assessed and raised by the defendants for the construction of the drain.

Held, the facts alleged as aforesaid by the plaintiff being proved, the plaintiff was entitled to all the relief asked. Although the statute limits no time in which the work should be done, it must be completed within a reasonable time.

The plaintiff was entitled to maintain the suit, and it was not necessary for the Attorney-General to be the plaintiff, on a like principle to that involved in *Wilkie* v. *Corporation of Clinton*, 18 Gr. 557.

The defendants, by virtue of the assessment under the by-law, became possessed of moneys which they were bound to expend in a certain way, and no other, for the benefit and advantage of certain land-owners and ratepayers, of which the plaintiff was one; in other words, a trust had been created, but it had been violated and not executed.

The defendants justified the diversion of part of the money raised in the following way. When the petition was signed, certain of the petitioners assessed, whose lands lay south of a certain

railway embankment, were promised that a certain drain then already constructed, and running from their lands across the railway to the Bachus drain, should be cleared out and repaired so as to carry the waters on their lands into the Bachus drain, without which the latter would be no benefit to them. These ratepayers signed the petition for the Bachus drain, and submitted to the assessment on the faith of this promise, in fulfilment of which the defendants passed a resolution in Council that the said other drain should be cleared out and repaired up to the point of junction with the Bachus drain, and the money diverted as aforesaid, which was only a small amount, was expended in carrying out the said resolution.

Held, the resolution, however well and justly and honestly intended, offered no justification whatever for diverting the moneys or any part of it from the intended Bachus drain.

Held, further, this was not a case for arbitration, or at all events, not a case in which the plaintiff was bound to proceed by arbitration.

C. Moss, Q.C., for the plaintiff.

Pegler for the defendants.

Ferguson, J.] [Sept. 15.

WHITNEY v. TOBY.

R. S. O. c. 118—Undue preference—Pressure.

A., acting on his own behalf and as agent for the other creditors of L., a trader in insolvent circumstances, obtained a transfer of certain securities for money, and also of some leather, to himself, which transfer it was now sought to set aside on the ground of undue preference. About Dec. 9, 1880, the bank which had been in the habit of discounting customer's notes for L., refused to do so any more. Thereupon L. went to A. and wanted him to procure discounts for him and give him the full proceeds. A. said he would not do this, but that he would procure discounts provided L. would allow him to apply a portion upon the indebtedness represented by himself. This L. agreed to, and the securities in question were transferred to A. on these terms, he paying a certain amount for them. As to the leather, L. asked A. to purchase it from him. This A. refused to do, but he said he would take it and sell it for him, and apply the proceeds on the accounts represented by him, which L. agreed to. A. was aware at the time of L.'s pecuniary embarrassment, and that he could not long continue business; he also knew the bank had refused any further discounts.

Held, nevertheless, after a review of the authorities, that inasmuch as it was A. who proposed to sell the leather, and apply the proceeds in the way in which they were applied; and inasmuch as the securities were brought to A. pursuant to a mode or scheme devised and proposed by him, and were dealt with according to that scheme; inasmuch as, that is, the idea of the preference originated with A., and L. did not seem to be the originator of any scheme or design to prefer A. or any of the other creditors for whom A. was acting, the transfers were not made "voluntarily," and "with a view of giving such creditors preference over other creditors," within the meaning of the statute, and could not be set aside; and although L. did that, the necessary and obvious effect of which was to prefer A. and those for whom A. was acting, yet the authorities forbade imputing, on these grounds, the *intent* to him, reasonable though it would appear to do so.

S. H. Blake, Q. C. (*Thompson* with him) for the plaintiff.

Maclennan, Q. C., for defendant Alexander.

McCarthy, Q. C., (*Foster* with him) for the other defendants.

Ferguson, J.] [Sept. 15.

WITHROW v. MALCOLM.

Patent Act, 1872, s. 19—Re-issue—Evidence—Imp. 14-15, Vict. c. 99.

A re-issued patent must be for the same invention as was the patent surrendered upon the re-issue taking place; the re-issue can include no new invention, that is, no invention not comprehended in the surrendered patent whose place it takes. The "claim" cannot be enlarged upon the re-issue of a patent if, by enlarging the claim or extending it, the invention is enlarged, if, that is, something new is imported into the re-issued patent, some invention not contained or comprehended in the surrendered one; but the "claim" may be enlarged on the re-issue provided the identity of the subject matter of the original patent is preserved.

Authorities elaborately reviewed and collated and on the principles therein laid down,

Held, in the present case—which was brought

to restrain alleged infringements of a certain re-issued patent, and in which the defendants disputed the validity of the re-issue—that the invention claimed in the re-issue was the same as that in the original surrendered patent, nothing in the nature of a substantially new invention being introduced; that the patentee honestly made a mistake in not claiming the whole of his invention at the time he obtained the original patent; that no excessive delay had elapsed between the issuing of the original and the application for the re-issue, and that, therefore, the re-issued patent was good if the original surrendered patent was not bad for want of novelty.

Section 19 of our Patent Act of 1872 is similar in terms to section 4916 of the American Patent Law, and therefore the American decisions respecting the re-issue of patent afford a guide as to the proper interpretation of the section of our Act.

Certified copies of some United States patents were offered in evidence for the purpose of showing that the inventions in the plaintiff's patents had been patented in a foreign country more than twelve months prior to the application for a patent here.

Semble, the copies could be read in evidence under the provisions of Imp. 14-15 Vict. c. 99, sects. 11 and 7.

McDougall, (Shepley with him,) for the plaintiffs.

W. Cassels, for the defendants.

Ferguson, J.] [Sept. 15.

KEITH V. FENELON FALLS.

Principal and surety—Municipal corporation—School board—Construction of bond—Mistake.

One D., being appointed secretary-treasurer of the Public School Board of a certain Union school-section, executed a bond with sureties for the due performance of the duties of his office. The bond recited that, "Whereas the above bounden D. has been appointed and now is the secretary-treasurer of the said Public School Board, and it is required that security should be given for the due and faithful performance of any and all the duties pertaining to such office;" and the condition in the bond was, "Do correctly and safely keep any and all moneys and papers belonging to the said School Board . . and do faithfully and honestly account for the receiving and disbursing by him of school moneys collected by school rate, rate bill, subscription or otherwise from the inhabitants or ratepayers of the said school section, or other parties, and do faithfully and honestly disburse any and all moneys as he may legally be required so to do by the said Public School Board. . . and do faithfully and honestly deliver up, account for and pay over any and all books, papers. . . chattels, moneys or valuable securities which at any time hereafter may come into his hands and possession as such secretary-treasurer."

Held (following *Parker* v. *Wise*, 6 M. & S. 247), if there was any difference in breadth of meaning between the words of the recital and those of the condition, the latter was subject to being explained and restrained by the former; and, applying this principle to the above bond, moneys received by D. outside of the duties pertaining to his said office were not within the scope of the surety's engagements under the above bond, and therefore a surety was not liable to make good any default of D. in respect to such moneys.

The village of Fenelon Falls was included in the Union school section in question, and in 1876 the municipal council, pursuant to by-law, raised on debenture $2,500 to pay for a school house in the school section, it being provided that a special rate should be levied to raise $450 annually, to pay the interest on and create a sinking fund for the said $2,500. In 1877, 1878, 1879 add 1880, on the requisition of the School Board the said municipal corporation paid over the $450 annually to D., and a large part of his defalcation was in respect of these moneys.

Held, the debentures were the debentures of the Municipal Corporation, and the moneys raised by the special rate were the moneys of the Municipal Corporation, and should have been received and taken care of by the Municipal Corporation, and not by D.; and the sureties under the above bond were not liable to make good D.'s default in respect of these moneys.

The plaintiff, one of the sureties to the above bond, being present at a meeting of the School Board, was told by the chairman that D. was in default $1,444, which he, the plaintiff, would have to make good. Whereupon the plaintiff assented to give, and did give, a mortgage to a trustee for the Board for this amount. No statement of D.'s

transactions as secretary-treasurer was ever shown the plaintiff; nor had he, till a short time before the commencement of this suit, any notice or knowledge that any part of D.'s defalcations was in respect of the moneys received as aforesaid from the Municipal Corporation.

Held, the plaintiff should be let in to redeem the said mortgage on payment of D.'s defalcations, less the amount of the moneys of the Municipal Corporation so received as aforesaid.

Semble.—If the money had been paid by the plaintiff under the above mistake of fact, it could be recovered back.

Maclennan, Q.C., (*Riordan* with him,) for the plaintiff.

S. H. Blake, Q.C., (*Barron* with him,) for the School Trustees, and the trustee of the mortgage

COMMON PLEAS DIVISION.

RE NORTH YORK ELECTION CASE.

PATTERSON V. MULOCK.

Elections—Petition against return of member—Jurisdiction of C. P. Division—Preliminary objection.

Held, by CAMERON, J., that the Common Pleas Division of the High Court of Justice has no jurisdiction to entertain a petition under the Dominion Controverted Election Act of 1874 and amending acts, against the return election of a member for the Parliament of Canada; but that the Courts of Queen's Bench, Common Pleas and Chancery are existing Courts, as well as the Court of Appeal, for the trial of such petitions; and that an objection to the jurisdiction was properly raised by preliminary objection.

McCarthy, Q.C., and *Osler*, Q.C., for the petitioners.

Robinson, Q.C., and *Moss*, Q.C., for the respondents.

CORRESPONDENCE.

The present Law Course.

To the Editor of the LAW JOURNAL.

SIR,—The recent abolition of the Law School and the consequent leaving of the student to his own resources for his legal education, suggest a few ideas with regard to the present law course.

With the large number of students throughout the country generally it seems to be the case, that the first year of their clerkship is simply a wasted twelvemonth. In the small town offices the student spends this year of his course in almost abject idleness. Any diligent young man of ordinary ability can get up his first intermediate work with one year's careful study; he knows this, and, therefore, does not bother himself about text-books and legal reading during this period, and his time, consequently, is devoted to dress-clothes and parties, or to other things which have a far worse tendency.

In larger offices his duties comprise post-office and bank errands, &c., with a little simple mechanical copying, over which his mind is not exercised for a moment, and, consequently, without adding anything material to his legal knowledge or professional training.

The student, moreover, is all this time under expense without any chance of lightening this burden by any exertions he might be capable of making if an inducement, such as the saving of time under articles, were offered, and without any benefit, such as instruction, for his faithful clerkship. This first year, then, is but a blank in the young man's legal life. He had better be at college with his English, a subject in which the great majority of the "learned men" of our country are wofully deficient; and it is sometimes heart-rending to hear in our courts, and from those too whom we are to regard as our models of professional perfection, Her Majesty's English mutilated and distorted out of all semblance to a modern tongue or language. I say it would be infinitely better to teach the student only English and penmanship this first year, and I am sure the profession thereby would be immeasurably benefitted.

Four years is ample for our curriculum, which is a fairly high standard, and if the barristers to whom students articled did their duty—their bounden duty in this case—there would be no need for the change which I am about to pro-

pose. But what clerk would think of making a practice of asking his barrister to explain "knotty points" in his reading, even though the latter had the time to devote to his student for that purpose? Or what barrister ever thinks of giving any instruction (beyond what is barely necessary to ensure the satisfactory—for his own purposes—execution of the work entrusted to the clerk) in the strict acceptation of the term, to his clerk upon legal practice, &c.? and the student gets no complete insight into this until four or five years of his own practice as a solicitor.

With these facts, and they are palpably solid facts, before us, would it not be better to have a more "instructive" course, a course more (than it is at present) for the educational benefits of the student, and, consequently, the ultimate improvement of the profession in general.

A student is not supposed to receive any pecuniary remuneration for his services in an office, but his solicitor in his articles of clerkship, covenants with him "that he will, by the best ways and means he may or can, and to the *utmost of his skill or knowledge, teach and instruct* or cause to be taught and instructed the said student in the said practice or profession of an Attorney-at Law and Solicitor in Chancery, which he, the said barrister, now doth or shall at any time hereafter during the said term use or practice." How many barristers are there who know that they ever made such an agreement? How few who ever dream of the performance of it! This proviso, therefore, for the benefit of the student, is a dead-letter. So the clerk now-a days gets little or no instruction, but is left entirely to himself to acquire as best he can practice and knowledge of the most difficult and complex of all the learned professions.

The following course would, I think, meet every want:

Let there be a Law College; let the matriculation be the same as that of the University of Toronto; and let the collegiate course be two years, divided into the usual college terms. Let the college be situated in Toronto, which is the legal centre of the country, and in which is concentrated the best talent of the profession which might be available from time to time for lectures, &c. Let the instructions be purely legal and thoroughly practical as far as possible, and be dispensed by a paid staff of competent practitioners. Let the professional practice of the Law College correspond to the commercial training of a modern Business College, and comprise the practice of Courts, conveyancing, &c. Let there be two examinations in the college course; the First Intermediate in Michaelmas Term of the first year, and the Second Intermediate in the corresponding term of the second year, after which the student would enter an office to complete, in actual practice, the remaining two years of his course.

Such a course as this would give the student a thorough legal foundation for the higher studies of his profession; would give him, in a solicitor's office, all the practical work now obtainable in the present course, and would supply barristers with a class of clerks who would be "up" in the practice, and, consequently, much more useful to them; while, at the same time, the profession on the whole would be much more worthily represented.

Yours truly,

Hamilton, Sept. 9th, 1882. PROFESSIONAL.

BOOKS RECEIVED.

LAW LECTURES. Subjects: Torts and Negligence, delivered before the law students of Toronto, at Osgoode Hall, by Joseph E. McDougall, Esq., Barrister-at-Law, Examiner of the Law Society on Criminal Law and Torts. Reported and published by J. P. Mabee, Esq., Student-at-law. Toronto: Rowsell & Hutchison, 1882.

THE ONTARIO LAW LIST and Solicitors' Agency Book (including also the Province of Manitoba) for 1882–83. 9th Ed. Toronto: J. Rordans & Co.

A MANUAL OF THE LAW applicable to Corporations generally; including, also, general rules of law peculiar to banks, railroads, religious societies, municipal bodies and voluntary associations, as determined by the leading courts of England and the United States. By Charles T. Boone, LL.B. San Francisco: Sumner, Whitney & Co., 1882.

A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY, illustrated by the leading decisions thereon. For students and practitioners. By H. Arthur Smith (Lond.) London: Stevens & Sons, 119 Chancery Lane, Law Publishers and Booksellers, 1882.

BLACKSTONE'S COMMENTARIES. For the use of students-at-law and the general reader; obsotete and unimportant matter being eliminated. By Marshall D. Ewell, LL.D., Professor of the Union College of Law, Chicago, etc. Boston: Soule & Bagbee, 1882.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

BILLS AND NOTES:—

A Treatise on Bills of Exchange, Promissory Notes, Coupon Bonds, and other negotiable instruments. By Isaac Edwards. 2 vols. 3rd edition, revised and enlarged by Dudley, Dennison & Dudley, New York, 1882.

CORPORATIONS:—

The American Corporation Cases; embracing the decisions of the Supreme Court of the United States and the Courts of Last Resort in the several States, since January 1, 1868, of questions peculiar to the Law of Corporations. Edited by Thomas F. Withrow. Vol. 1, Private Corporations, 1872; vol. 2, Municipal Corporations, 1874; vol. 3, Private Corporations. E. B. Meyers & Co., Chicago, 1880.

DIGESTS:—

United States Digest. Vol. 12. Being the Annual Digest for 1881; Boston, 1882. A Digest of all reported cases not contained in the Law Reports, decided in the various English Courts, together with a full selection of cases of importance from the Irish and Scotch Reports, and references to the American Reports of Standing, and a complete index to every reported case for the year 1881. By Alfred Emden, London, 1882. See also under "Insurance," *infra*.

ELEMENTS OF LAW:—

Elements of the Laws, or Outlines of the System of the Civil and Criminal Laws in force in the United States and in the several States of the Union. Designed as a text book and for general use, and to enable anyone to acquire a competent knowledge of his legal rights and privileges, in all the most important political and business relations of the citizens of the country, with the principles upon which they are founded, and the means of asserting and maintaining them in civil and criminal cases. By Thomas L. Smith. New and revised edition. Baker, Vorhis & Co., Philadelphia, 1882.

EMINENT DOMAIN:—

A treatise upon the law of Eminent Domain. By E. Mills. Little, Brown & Co., St. Louis, 1876.

INFANCY AND COVERTURE:—

Commentaries on the law of infancy, including guardianship and custody of infants, and the law of coverture, embracing dower, marriage and divorce, and the statutory policy of the several States in respect to husband and wife. By Ranson H. Tyler. 2nd Edition. Little, Brown & Co., Albany, 1882.

INSURANCE:—

New Digest of Insurance decisions, Fire and Marine, together with an abstract of the law on each important point in fire and marine insurance. The whole being intended as a complete handbook of the law, as established by the most recent adjudications in this country and Great Britain. By C. C. Hine and W. S. Nicholls. Baker, Vorhis & Co., New York, 1882.

LANDLORD AND TENANT:—

A practical treatise on the law of Landlord and Tenant in the State of Pennsylvania; with a complete discussion of Ejectment and Replevin. By Tatlow Jackson and Joseph P. Cross, Philadelphia, 1882.

NEGOTIABLE INSTRUMENTS:—

A treatise on the law of Negotiable Instruments, including bills of exchange, promissory notes, negotiable bonds, and coupons, checks, bank notes, certificates of deposit, certificates of stock, bills of credit, bills of lading, guarantees, letters of credit, and circular notes. By John W. Daniel. 2 vols. 3rd Edition. Baker, Vorhis & Co., New York, 1882.

PROCEEDINGS IN REM:—

A treatise on proceedings in Rem. By Rufus Waples. Callaghan & Co., Chicago, 1882.

REAL PROPERTY:—

A treatise on the American law of Real Property. By Emory Washburn. 3 vols. 4th Edition. Little, Brown & Co., Boston, 1876.

THE REPORTERS:—

The Reporters arranged and characterized with incidental remarks. By John W. Wallace. 4th Edition, revised and enlarged. Published under the superintendence of Franklin Fiske Heard, Boston, 1882.

REPORTS:—

38 American; 48 Connecticut; 53 Wisconsin; 33 New York; report of cases decided in Court of Appeal of State of New York, from Oct. 4th, 1881, to Nov. 22nd, 1881; with notes, references and index. By H. E. Sickles. Vol. 41 Albany, 1882. 131 Massachusetts; 101 Illinois; 10 Missouri; 73 Maine; 56 and 57 Maryland, C. of A.; 2 Nova Scotia; reports of cases decided in High Court of Chancery of Maryland. By T. Bland. 3 vols, 1836–1841. Reports of cases adjudged in the District Court for Eastern District of Pennsylvania, Philadelphia, 1857; reports of cases determined in the Surrogate Courts of New York. Vol. 3, 1879. 30 English (Moak).

LAW OF PERSONAL PROPERTY:—

Treatise on the law of sale of Personal Property; with references to the American decisions and to the French code and civil law. By J. P. Benjamin. 3rd American Edition, by Edmund H. Bennett, Boston, 1881.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1882.

During this term the following gentlemen were called to the Bar, namely:—

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely:—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely:—

Graduates—Archibald Gilchrist Campbell, Alex. W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William, John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Rielly. Articled Clerks—E. Considine, D. A. Cameron.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I.; II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1882—The Deserted Village.
The Task, B. III.

Canada Law Journal.

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DIARY FOR OCTOBER.

21. Sat. .. Battle of Trafalgar, 1805.
22. Sun... *20th Sunday after Trinity.*
23. Mon.. Lord Monck, Governor-General, 1861.
24. Tue... Supreme Court Session begins. Sir J. H. Craig, Governor-General, 1807.
25. Wed.. Battle of Balaclava, 1854.
29. Sun... *21st Sunday after Trinity.*
31. Tue... All Hallow Eve. Second Intermediate Examination.

TORONTO, OCT. 15, 1882.

SIR CHARLES HALL has resigned his position as one of the Vice-Chancellors of England.

AT the conclusion of a case at Sandwich recently, Chief Justice Hagarty remarked upon the promptness with which the United States authorities surrendered, without any legal quibbling, criminals who flee from Canada, and added that he hoped to live to see the day when the Canadian authorities would act with the same promptness in returning criminals wanted in the United States, and not permit this country to be made a haven for bad characters from over the border.

WE regret that Mr. R. P. Stephens has been compelled through ill health to resign his positiou as Registrar of the Court of Queen's Bench. He is succeeded by Mr. John Winchester, who will doubtless make an efficient officer.

Whilst we have not one word to say against the fitness of this gentleman for the position to which he has been appointed, we are old-fashioned enough to think that offices, such as that which became vacant by the retirement of Mr. Stephens, instead of being filled by young men well able to battle for themselves and their clients, ought rather to be given to some one of the many older members of the Bar who might be glad to accept them as a relief from what may, from various circumstances, be a hard struggle for existence. What is wanted for such a position is not energy and push so much as the steadiness and experience of riper years.

THE death is announced of Hon. E B. Wood, Chief-Justice of Manitoba. He died suddenly at Winnipeg, in the sixty-third year of his age. We are compelled to hold over an obituary notice until next issue.

The name of Hon. John O'Connor has been mentioned in connection with the vacant seat, but, as we write, no appointment has been made. Mr. O'Connor is a self-made man of solid ability, and a sound lawyer, and has many qualifications for the position. The Winnipeg Bar, thinking that it had some interest in the appointment, as in truth it has, met and passed a resolution naming Mr. T. W. Taylor, Q.C., as the person of their choice. However desirable it might be that the voice of the Bar should be heard on these occasions, and quite agreeing that Mr. Taylor would make an excellent judge, it is not likely that any ministry would give up the patronage thus naturally falling to it, or endeavour to escape one of the difficulties of their position by throwing on others their responsibility to the country in so important a matter.

WE do not intend to express an opinion, one way or the other, on the course which Convocation recently thought fit to pursue with reference to stopping the reporters' salaries, but we cannot but deplore the tone in which the subject has been discussed in some

of the daily journals. The suggestion that a body of gentlemen must necessarily have been biassed by political considerations in whatever they have done or not done as Benchers of the Law Society, is too puerile and ridiculous to be taken seriously. It is a joke, and a very bad one. It will, we venture to say, find little favour at Osgoode Hall, where those who in political matters are inclined to Conservatism will be disposed to say, Save us from our friends! For ourselves, as a legal journal, we have no more to do with politics than the Man in the Moon or the Benchers of the Law Society.

ANOTHER case of petty pilfering at Osgoode Hall has recently come to our notice. It appears that a few days ago a member of the profession left a neck-tie and scarf pin of some little value on the mantel-piece in the inner barristers' room in the Chancery wing, upon going into Court, and on his return found that, though the mantel-piece was still there, the neck-tie and pin were not. Even the halls of justice are not sacred to the sneak-thief, and until some of the more militant members of our body consent to practise sentry duty at the entrance to the various barristers' rooms, it is hard to say how such incidents can be prevented. No doubt a few full privates of the Queen's Own or Tenth Royals posted, with all their armour on, in different parts of the buildings might prove a remedy, but it is the only one we can suggest. Meanwhile, those who will play the confidence game for their own amusement must take the consequences.

RECENT ENGLISH DECISIONS.

Proceeding with L. R. 7 App., at p. 259 is a very important case on the meaning of "injuriously affected" as applied to lands in Acts relating to railways, viz., *Caledonian Ry. Co.* v. *Walker's Trustees.*

RAILWAYS—"INJURIOUSLY AFFECTED"—R. S. O. c. 165, s. 7.

The words "injuriously affected" are found in this connection in our R. S. O. c. 165, s. 7. The grounds on which the plaintiffs claimed to be "injuriously affected" in *Caledonian Ry.* v. *Walker* were, that the railway was constructed in such a way as to run directly across two streets, one on the north and one on the south of the property on which their cotton-mill stood, which had formerly been the special and only means of access therefrom to the principal thoroughfare of the district, and had thereby rendered it necessary that all carts, carriages and passengers going to or from the plaintiff's works should go by a longer detour, along certain new streets on which, moreover, the gradients were considerably steeper than those of the former streets thus obstructed. The House of Lords held that, under these circumstances, the property of the plaintiffs was "injuriously affected" within the meaning of the Railway Act. For the defendants, it was contended, that compensation was excluded by *Caledonian Ry. Co.* v. *Ogilvy*, 2 Macq. 229, and *Ricket* v. *Metropolitan Ry.*, L. R. 2 H. L. 175; while the plaintiffs relied on *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243. These three cases, with others, are therefore discussed at length in the opinions of their lordships. Lord Selborne says of them:—"All the three decisions appear to me to be capable of being explained and justified upon consistent principles; the propositions which I regard as having been established by them, and by another judgment of our lordships in the the case of *Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. L. 171, being these:—1. When a right of action which would have existed if the work, in respect of which compensation is claimed, had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Act; established by *Ogilvy's* case, 2 Macq. 229. ii. When damage arises, not out of the execution but only out of the subsequent use of the

work, then also there is no case for compensation; established by *Brand's* case, L. R. 4 H. L. 171. iii. Loss of trade or custom by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation; established by *Ricket's* case, L. R. 2 H. L. 175. iv. The obstruction, by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation; *Chamberlain's* case, 2 B. and S. 617; *McCarthy's* case, L. R. 7 H. L. 243." Lord O'Hagan and Lord Blackburn declare the present case undistinguishable from *McCarthy's* case; they also express entire concurrence with Lord Selborne. Lord Blackburn declares that it is not easy, and that to his mind it was not possible, altogether to reconcile the above mentioned decisions of the House. He concurred, however, in the decision of the other Lords as regards the present case. He says, as to *Ogilvy's* case, "I think the ground on which both the Lord Chancellor (Cranworth) and Lord St. Leonards decided in *Caledonian Ry. Co.* v. *Ogilvy*, 2 Macq. 229, was that no compensation is given for damages occasioned by the works of the company, if the thing done was one for which, if done without any statutable power, no action could have been maintained, however certain it may seem that it would never have been done but for the creation of the company, which, notwithstanding Lord Westbury's strong opposition, is, I think, now settled to be correct law. Next, that though an action would have lain for the thing done, yet no compensation is given unless the ground of action would be that lands, or some interest in lands, was injuriously affected, which also is, I think, now settled law, and they thought that the pursuer could not have maintained an action at all, or, if he could, that it would have been an action in respect of personal loss or inconvenience, and not an action in respect of an injurious affection of his land or house." Speaking of *McCarthy's* case, L. R. 7 H. L. 243, he says:—"I think this decides that the right of access by a public way to land, is a right attached to the land, and that if an obstruction to the public right of way occasions particular damage to the owner or occupier of that land by diminishing its value, the action which he might bring for that particular damage would be an action for an injury in respect of the land;" and he adds, "Now I do not dispute that an obstruction to a highway may be so distant from lands that no one could reasonably find that the lands were appreciably damaged by the obstruction, but I think it unnecessary to try to give a definition of that distance; it is enough to say that in this case the distance is not too great."

PROPER MODE OF DEALING WITH RECORDED CASES.

There is a *dictum* of Lord Selborne on this point, at p. 275, which seems noticeable; he says, "The reasons which learned Lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the house."

The next case requiring notice is the last in this number of the appeal cases, viz., *Mussoorie Bank* v. *Raynor*, p. 321.

WILL—PRECATORY TRUSTS.

In this case it appeared that a testator made his will thus: "I give to my wife the whole of my property, both real and personal, including" [government promissory notes, bank shares, a house, plate, money, furniture, carriages, horses, etc.] "feeling confident

that she will act justly to our children in dividing the same when no longer required by her." The Privy Council held that the wife took an absolute interest. In their judgment their Lordships say: "Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the consicience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to a absolute gift." And more generally: "Their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shews that if the doctrine of precatory trusts were applied to the present case it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker. Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain."

The remaining July numbers of the Law Reports which remain for service, consist of 9 Q. B. D. p. 1-13; 7 P. D. p. 101-117; and 20 Ch. D. p. 229-441.

AWARD AND SATISFACTION—DELIVERY OF CHEQUE.

In the first of these, the first case which requires mention is *Goddard* v. *O'Brien*, p. 37. In this case, A. being indebted to B. to the amount of £125, for goods sold and delivered, gave B. a cheque for £100, payable on demand, which B. agreed to accept in satisfaction. The question was whether this was a good award and satisfaction. On the negative side, it was argued that the case fell within the rule laid down by Brett, C.J., in *Cumber* v. *Vane*, Str. 426, that a debt is not satisfied by a receipt of a security of equal degree for a smaller sum. The Divisional Court, however, held in favour of the affirmative. Grove, J. says:—"The difficulty arose from the rule laid down in *Cumber* v. *Vane*. But that doctrine has been much qualified, and I am not sure that it has been over-ruled. In *Sibree* v. *Tripp*, 15 M. & W. 23, the judgments of Parke and Aldernon, D.B., and strong expressions of a contrary opinion." And he adds, "to say that you may receive something which is not money,—a chattel, for instance, of inferior value; but that you cannot receive money, is to my mind a very singular state of the law. I cannot see why the same reasoning should not apply to a chattel as to money." On the subject of the state of the law in this respect, the amusing language of Jessel, M. R., in *Couldery* v. *Bartram*, L. R. 19 Ch. D. 399 (noted *supaa*, p. 210), may be cited. In *Goddard* v. *O'Brien*, Huddleston, B., says the rule cannot be better stated than it is in the notes to *Cumber* v. *Wane*, Smith's L. C. 8th Ed. at p. 366.

LAW SOCIETY.

TRINITY TERM, 46TH VICTORIA, 1882.

The following is the *resume* of the proceedings of the Benchers on the 27th June, and during Trinity Term. Published by authority.

During Trinity Term the following gentlemen were called to the Bar, namely:—

Mr. J. D. Cameron and Mr. C. W. Oliver, with honors, and Messrs. J. C. F. Bown, C. J. Leonard, E. E. Kittson, V. A. Robertson, L. E. Dancy J. H. Ingersoll, H. W. Hall, R. A.

Pringle, J. C. Alguire, F. A. Knapp, J. A. Robinson, and J. M. Ashton.

The following gentlemen received Certificates of Fitness, namely :—

Messrs. J. D. Cameron, C. W. Plaxton, B. F. Justin, J. C. F. Bown, J. Chisholm, D. J. Lynch, C. J. Leonard, W. J. Nelson, J. C. Culham, G. W. Marsh, J. A. Robinson, R. C. Hays, J. C. Coffee, E. Cahill, W. M. Germon, H. D. Helmcken, and J. M. Ashton.

The following gentlemen passed their first Intermediate Examination, namely :—

A. C. Macdonell (First Scholarship), A. S. Lown (Second Scholarship), A. B. McBride (Third Scholarship), and W. A. Matheson, D. S. Kendall and T. J. Blain, with honors, and L. H. Patten, G. H. Jarvis, J. B. Jackson, W. E. Middleton, J. W. St. John, A. C. Rutherford, D. J. Owens, S. O'Brien, George E. Evans, J. A. Forin, J. L. Duncan, M. Wilkins, W. D. Jones, F. E. Nelles, F. W. Thistlewaite, H. H. Bolton, N. A. Bartlett, R. D. Gunn, G. E. Kidd, and A. Gillespie.

The following gentlemen passed their Second Intermediate Examination, namely :—

George Morehead (First Scholarship), T. C. Short (Second Scholarship), A. W. Ambrose (Third Scholarship), and A. F. Godfrey, W. A. Stratton, G. F. Cairns, G. W. Ross, T. C. Atkinson, J. Burdett, W. J. Peck, C. C. Ross, T. B. Shoebotham, W. Lees, W. H. Gordon, W. J. Taylor, F. E. Titus, J. M. Best, G. W. Danks, M. McFadden, P. J. King, F. S. Wallbridge, J. N. Marshall, H. McMillan, J. G. Forgie, J. P. Telford, M. S. McCraney.

The following gentlemen passed the Preliminary Examination as Students and Articled Clerks, namely.—

Graduates—Spencer Love, Francis Robert Latchford, John Alfred McAndrew, Henry Walter Mickle, A. M. Lafferty, Charles T. Glass, Arthur E. O'Meara, Angus McMurchy, Edward George Graham, Robert Hall Pringle, Smith Curtis, Willoughby L. Brewster, John Frederick Grierson, Edward K. C. Martin, J. Shilton, Christopher Robinson Boulton, Fenwick Williams Creelman, William H. Blake, F. W. G. Thomas, William Morris, Alexander Clive Morris, David Fasken, James Baird, F. C. Wade, G. S. Macdonald, George G. S. Lindsay, Alfred Herman Gross.

Matriculants—Joseph S. Walker, G. J. Cochrane, D. D. L. Grierson, E. J. B. Duncan, Francis Hall, John F. Wills, Henry Parker Thomas, William F. Johnston, Thos. A. Wardell, W. H. Hearst, Norman McDonald, W. J. Millican, John McKay, Robert C. Le Visconte.

Juniors—H. A. Percival, J. H. Reeves, J. S. Chalk, J. H. A. Beattie, W. B. Lawson, H. N. Roberts, F. F. Lemieux, J. P. Moore, J. H. Sinclair, G. H. Dawson, N. McCrimmon, J. Y. Murdoch, J. G. Leggett, G. H. Hutchison, G. L. Lennox, R. A. Bayley, E. A. Crease, J. H. Jack, J. W. Bennett, M. McLean, W. G. Burns.

Tuesday, June 27th, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Crickmore, L. W. Smith, J. F. Smith, Bethune Kerr, Benson, Murray, McLennan, Martin, McCarthy, Read.

The Report of the Legal Education Committee on the petition of G. B. Douglas was adopted.

The final Report of the Building Committee was adopted.

The Report of the Engineer on the subject of the condition of the heating apparatus was received.

Ordered, That a copy of this Report be sent to the Attorney-General and the Commissioner of Public Works, and that Mr. L. W. Smith do confer with them on the subject.

Mr. Martin presented the Report of the County Library Aid Committee, recommending that the initial grants to existing associations should be doubled, and that the whole subject of grants to county libraries should be reconsidered.

The Report was considered.

Mr. Martin moved the first reading of the following rule :—

1. The maximum initiatory, or first grant, provided by the 6th sub-section of the rule as to County Libraries, adopted on the 24th day of June, A. D. 1879, shall not exceed twelve dollars for each practitioner in the county or union of counties; and the said sub-section is hereby amended by substituting for the words "six dollars," the words "twelve dollars."

2. This rule shall extend to existing Library Associations.

3. In case the contributions in money or books made to any existing Library Association, and to be taken into account in estimating the amount of its first grant, have been insufficient to entitle it to the maximum first grant hereby pro-

vided, it shall be competent to supplement such contributions at any time before the 31st December, 1882, and on evidence thereof being supplied, such association may receive the balance coming to it in respect of the maximum first grant under this rule.

The rule was read a first time.

Mr. Martin moved that the rules be dispensed with, and that the said rule be read a second and third time. Carried unanimously.

The rule was read a second and third time, and was carried.

Ordered, That the County Libraries Aid Committee be directed to take steps to ascertain by 31st December next, in what further cases it may be expected that County Libraries will be formed.

Mr. Martin moved, and it was resolved, That in the opinion of Convocation the practice of using Osgoode Hall for the trials of causes involving the examination of witnesses was producing great and increasing inconveniences, and should be discontinued.

Ordered, That the Treasurer, and Messrs. McCarthy, Maclennan, and the mover, be a Committee to call upon the judges and the Attorney-General, for the purpose of representing the necessity of arrangements being made as early as practicable which will remove the inconveniences which have prevailed under the present system, and which are constantly increasing.

Mr. Crickmore presented the Report of the Lecturers on the subject of the examinations in the Law School, and moved that Messrs. Maclennan, J. F. Smith, and the mover, be a Committee to ascertain and report who, if any, are entitled to prizes under the said report and the rule in that behalf.

On the motion of Mr. Maclennan an order was made as to the distribution of the earlier parts of the Election Reports published by Mr. Hodgins.

Mr. Benson and Mr. Murray were appointed a Committee to examine the Journals, and report on the first day of Trinity Term as to whether any and which of the elected Benchers had vacated his seat by non-attendance.

Mr. J. F. Smith presented the Report of the Select Committee as to prize men in the Law School, which was adopted, and was as follows:—

To the Benchers of the Law Society:

The Special Committee to whom was referred the consideration of the question as to which of the parties, if any, are entitled to prizes under the examinations by the Lecturers of the Law School, beg leave to report that in the Senior Class no one has obtained the requisite number of marks, namely, three-fourths; and that in the Junior Class, Mr. D. C. Ross is entitled to a prize of law books of the value of twenty-five dollars.

(Signed) J. F. SMITH,
Chairman.

Ordered, That pursuant to the Report, Mr. D. C. Ross do receive a prize of law books to the value of twenty-five dollars as prize man of the Junior Class.

Monday, 28th August, 1882.

Present—The Treasurer, and Messrs. Crickman, Hoskin, Irving, Mackelcan, Moss, Bethune, Maclennan, Meredith, Martin, Ferguson, Beaty, Benson, Read.

Mr. Benson presented the Report of the Select Committee to examine the Journals on the subject of vacation of the seats of elected Benchers, in which it appears that the Hon. Stephen Richards, Q. C., and John Bell, Esq., Q. C., had vacated their seats by non-attendance.

Ordered, That a call of the Bench be made for Friday, September 8th, for the election of two Benchers in their place.

Tuesday, 29th August, 1882.

Present—Messrs. Benson, Bethune, Crickmore, Maclennan, Ferguson, Beaty, Mackelcan, Foy, Moss, Irving and Read.

Mr. Benson was elected chairman in the absence of the Treasurer.

The Committee on Legal Education reported on the case of Mr. Alguire as follows:—

As to the case of John Calvin Alguire, it appears that during this Term he has passed the ordinary examination required to be passed by candidates for call. On the 7th September, 1878, registration in Montreal of certificate of clerk with Hilton took place. He was transferred to Hutchison for the residue of the term of three years. P. H. Ray, Secretary of the Bar of Lower Canada, District of Montreal, certifies as of the date of 7th September, 1878, that he was registered. There are certificates of Messrs. Hilton and Hutchison that he has served the three years, and done all things to entitle him to be examined and admitted to the privileges of the Bar of Lower Canada. The Committee recom-

mend that Mr. Alguire produce a certificate of his having passed the preliminary examination in Montreal; a declaration of his own, showing the causes accounting for the delay in registering his contract of service, and testimonials of good character, to the satisfaction of the Society; and that thereupon he be called to the Bar.

The Report was adopted.

Ordered, That Mr. Alguire having complied with all the requirements of the Report, be called to the Bar.

In the case of Mr. Knapp, the Special Committee to whom it was referred, reported as follows:—

Trinity Term, 29th August, 1882.

To the Law Society in Convocation:

The Special Committee to whom was referred the case of Frederick Augustus Knapp, beg leave to report that Mr. Knapp is entitled to be called to the Bar, under the rules in special cases. He appears to have been called to the Bar, and is still a member of the Bar of the Province of Quebec, section of the District of Montreal, in good standing; and that since his call no adverse application has been made to disbar him, and that no charge is pending against him for professional or other misconduct; that he has duly given the notice both in the *Gazette* and to the Society as required by the special rules; and he having passed before us the examination prescribed, and paid the fees payable by the candidates for call to the Bar, under the said rules, and it appearing that the same privilege is extended to barristers of Ontario in the Province of Quebec, the Committee therefore recommend that he be called to the Bar.

As to his position of candidate for Certificate of Fitness, the Committee find that he has been in actual practice as a barrister and advocate in the Province of Quebec for three years; that no application has been made to disqualify him from practice at the Bar of Quebec, and that no charge is pending against him for professional or other misconduct; that he has given the notices as well to the Society as in the *Gazette*, required by the rules for the admission of solicitors in special cases, and that the same privilege is extended to solicitors of Ontario in the Province of Quebec, and he having furnished the necessary fees. The Committee recommend that he receive his Certificate of Fitness.

(Signed) JAMES BETHUNE,
Chairman.

Mr. Bethune moved the adoption of the first clause of the report recommending that Mr. Knapp be called to the Bar.

Ordered, That Mr. Knapp be called to the Bar.

Mr. Bethune moved the adoption of the second clause of the Report recommending that Mr. Knapp receive a Certificate of Fitness.

Mr. Beaty, seconded by Mr. Foy, moved in amendment, That the Report on Mr. Knapp's case, recommending that he receive his Certificate of Fitness, be referred to a committee consisting of Messrs. Maclennan, Mackelcan, Crickmore, Bethune and Beaty, to report,

1. Whether an advocate from the Province of Quebec, admitted to the Bar of Ontario, must first pass an examination in the law and practice of law in Ontario to entitle him to admission to practice as a solicitor.

2. If so, what such examination shall be, and in what subjects, and to what extent in comparison with the ordinary examination of articled clerks in Ontario.

3. Whether application to the Court must first be made to direct such examinations, or whether application to the Court for admission is to be made after such examination.

4. What fees are payable by Mr. Knapp.

Mr. Beaty's motion in amendment was carried.

The Rule to amend Rules 94, 95, 97 and 98, relating to the call of Barristers in special cases, and the admission of attorneys and solicitors in special cases, was read a first time.

Ordered, That the Rule be read a second time ou Saturday, September 2nd.

Saturday, September 2nd, 1882.

Present—The Treasurer, and Messrs. Read, Irving, Bethune, Ferguson, Crickmore, Maclennan, Moss, Foy, Fraser, J. F. Smith, and Benson.

The Report of the Finance Committee as to the investments made by them, was read and received.

The Rule to amend Rules 94, 95, 97 and 98, was read a second time.

Ordered, That it be read a third time on September 8th.

The Rule as to notice was suspended unanimously, and the following Rule was read a first time:—

Rule 126 is hereby amended by adding thereto the following words: "And for every other

certificate not by these rules otherwise provided for, one dollar.

Ordered for second reading on September 8th.

On motion of the Chairman of the Legal Education Committee, it was ordered, That no Candidate for Call or Certificate of Fitness who shall have omitted to leave his petitions and all his papers with the Secretary complete, on or before the third Saturday preceding the term, as by the rules required, shall be called or admitted except after report upon a petition by him presented, praying special relief on special grounds.

On motion of Mr. Bethune, it was ordered that the fees for the Examiner for Matriculation where but one Examiner is appointed, shall be fifty per cent. more than the present tariff, that is, a fee of twenty-four dollars, and one dollar and fifty cents for each student examined.

The Chairman of the Library Committee presented the Report of the Library Committee, as follows :-

The Library Committee beg leave to recommend that Convocation authorize the opening of the library in the evening, except during Christmas vacation and Saturday nights, from the first of November, 1882, to the first of June, 1883, the hours of opening and closing in the evening, and arrangements previously ordered, to be continued for the above period.

(Signed) EMILIUS IRVING,
Chairman.

28th August, 1882.

The Report was adopted, and it was ordered accordingly.

September 8th, 1882.

Present—The Treasurer, and Messrs. Irving, S. H. Blake, Crickmore, Murray, Foy, Moss, Beaty, Mackelcan, J. F. Smith, Ferguson, Kerr, Hardy, McCarthy, Maclennan, and Benson.

The Chairman of the Legal Education Committee presented a Report on the Curriculum as follows :-

To the Benchers of the Law Society in Convocation :

The Report of the Legal Education Committee.

The Committee has had under consideration the expediency of putting Leiths Williams on the curriculum. They recommend that the examiners be instructed to give their questions from Leiths Williams hereafter, and that the secretary be authorized to publish forthwith a notice that at the first Intermediate Examination hereafter, including next Michaelmas Term, the examiners will give questions on Leiths Williams on Real Property.

The report was received and ordered for immediate consideration. After debate it was ordered that the further consideration of this clause be deferred till the second day of next term.

On the recommendation of the Committee on Legal Education it was ordered that Mr. D. B. S. Crothers be permitted to come up for his Second Intermediate Examination in Hilary Term, 1883.

Mr. Crickmore presented the report of the Select Committee on Mr. Knapp's case as follows :—

The Committee to whom was referred the application of Mr. Knapp to be admitted as a solicitor of the Supreme Court of Judicature of Ontario, beg leave to report as follows :—

1. Under the Rules of the Society Mr. Knapp must, before he can receive a Certificate of Fitness as a solicitor, pass the ordinary examination prescribed for candidates for Certificate of Fitness.

2. Under the Statutes of the Province now in force Mr. Knapp, or any barrister who is an advocate of the Province of Quebec, is entitled to apply to the High Court of Justice for admission as a solicitor ; and that Court may, in its discretion, admit him as a solicitor on his passing an examination before this Society to the satisfaction of the Court.

3. It has been ascertained that the High Court of Justice will accept our certificate of such an applicant, having passed an examination before the Society, as satisfactory.

4. The Committee recommend that the Rules of the Society be so altered that in cases of applicants of the same class as Mr. Knapp, they be examined on the Statute Laws of the Province, including the Judicature Act, before a committee to be appointed by Convocation, and that upon passing such examination they be reported to the High Court of Justice as having passed an examination in pursuance of chap. 140, sect. 3.

5. In the event of such alteration the applicant in such a case may apply to the Society to be allowed to pass the said examination before applying to the Court to be admitted as a solicitor ; this was done and approved of by the Court in the case of Mr. Alguire.

6. In the event of such alteration in such a

case as that of Mr. Knapp, the fees payable should be the same as those payable by an applicant for Certificate of Fitness who comes up in the ordinary way of his service under articles of clerkship.

(Signed) JOHN CRICKMORE,
Chairman.

The first three clauses of this report were adopted, the consideration of the remaining three clauses was postponed until the second day of next term.

Mr. Maclennan presented the following report, namely :—

The Committee on Reports beg leave to report as follows :—

The Committee has had under consideration what provision should be made for reporting decisions in election trials.

1. The Committee recommend that the reporters of the Court of Appeal and of the High Court be required to report election decisions under the direction of the editor.

2. That the work be distributed among the reporters as they may arrange between themselves, or as may be prescribed by the editor in advance of the trials.

3. That it shall not be necessary for the reporters to attend trials personally, but they shall take care to procure from the judges, registrars, counsel and shorthand writers engaged in the respective trials, the materials for a report.

4. That the practice reporters prepare reports of all decisions on questions of practice pronounced elsewhere than at the actual trial of any cause.

5. That election decisions, including those on points of practice, be published in volumes as shall be directed by the editor, with the approval of the Reporting Committee.

6. That the judges be requested to assist the Law Society in obtaining materials for the reports.

7. The Committee have to report a vacancy in the Practice Reporting made by the resignation of Mr. Perdue, and recommend that temporary provision be made until a successor to Mr. Perdue can be appointed.

8. The reporters have neglected to send in their returns for this term, with the exception of Mr. Grant.

9. Mr. Tupper's arrears are, as your Committee have ascertained, being brought up by Mr. Harman by arrangement with Mr. Tupper, and your Committee hope they will soon be worked off.

All which is respectfully submitted.

(Signed) JAMES MACLENNAN,
Chairman.

The report was ordered for immediate consideration.

The report was read clause by clause.

The first seven clauses were adopted.

On the eighth clause, Mr. McCarthy moved that all cheques for the salaries of the reporters who have not made returns this term, be withheld until the second day of next term, to give an opportunity to Convocation to consider their returns.

Mr. Hardy moved in amendment, to expunge all the words after "until," and to substitute the following words :—"The Committee shall report to the treasurer that satisfactory returns have been made."

At this point a letter from Mr. Vankoughnet, on the subject of the returns, was read.

The amendment was lost, and the main motion was carried.

Mr. Perdue's resignation was accepted, and it was ordered that the usual notice be issued, and an advertisement published with the view of appointing a reporter of Practice and Chamber cases, on Tuesday, 21st November next.

Ordered, That Mr. Ulric Brunet's matriculation fee be refunded in full under the special circumstances of his case.

Mr. John Bell, Q.C., was re-elected a Bencher.

Mr. Alexander Leith, Q.C., was elected a Bencher in the place of the Hon. Stephen Richards, Q.C.

The Rule amending Rules 95, 96, 97 and 98, as to Call and Admission of Barristers and Attorneys, was read a third time as follows :—

By the Benchers of the Law Society of Upper Canada in Convocation, with the approbation of the Judges of the Superior Courts as visitors of the Law Society, it is ordered as follows :—

1. That so much of Rules 94, 95, 96, 97 and 98, as apply to Solicitors of the Superior Court of Judicature in England, Attorneys or Solicitors in the Courts of Chancery, Queen's Bench, Common Pleas or Exchequer in Ireland, Writers to the Signet, or Solicitors in the Superior Courts of Scotland, persons called to the Bar by any of the Inns of Court, or Societies having

authority to call to the Bar of any of the Superior Courts of England, Scotland, or Ireland, or in any of the Superior Courts not having merely local jurisdiction in England, Ireland, or Scotland, shall be and stand repealed from and after the last day of Hilary Term next.

2. Any Attorney or Solicitor in the Supreme Court of Judicature in England, who shall furnish proof that he has for seven years been in actual practice as such Attorney or Solicitor, may be admitted and enrolled as a Solicitor of the Superior Court of Judicature in Ontario, without examination, upon payment of the like fees and giving of like notices as required in the case of Attorneys and Solicitors of the other Provinces of the Dominion under the said Rules.

3. Provided that this Rule shall not affect any of the persons named in sub-section 2 of Rule 98, who before the last day of Hilary Term, 1883, shall be bound by a contract in writing to a practising Solicitor in Ontario, as mentioned in the said sub-section 2.

The Rule was passed.

Convocation adjourned.

REPORTS

RECENT ENGLISH PRACTICE CASES.

TURNER v. BRIDGET.

Imp. J. A., O. 1, r. 2—Ont. J. A., Rule No. 2.

Interpleader—Summary decision—R. S. O. c. 54, ss. 5, 7.

When the Judge in Chambers had referred an interpleader matter to the Divisional Court, and the latter had summarily heard and determined it.

Held, no appeal to the Court of Appeal would lie.

May 5, C. A.—L. R. 9 Q. B. D. 55.

BRETT, L. J.—The sections of the Common Law Procedure Act, 1860 (R. S. O. c. 54, ss. 5,7) are not repealed or altered by the Judicature Acts, which leave them as they were before. The rule to be deduced from the authorities is that upon anything which may occur on the trial of an interpleader issue there is an appeal from the judgment of the Judge who tries such issue, either with or without a jury; but that where a Judge at Chambers, who hears an interpleader summons, does not order an issue but decides the matter in the exercise of the summary jurisdiction given by s. 14 of the C. L. P. Act, 1860 (R. S. O. c. 54, s. 5) his decision is final, and there is no appeal from it. . . The only question which remains is whether what was done in the present case was in the exercise of the summary jurisdiction given by the statute. If it had been done by the Judge at Chambers, then there would have been no doubt that it was done in the exercise of such jurisdiction. Is that altered because the Judge declined to deal with it at Chambers and referred it to the Court? We are of opinion that it is not. A Judge at Cham- is always acting for the Court, and when he refers such a matter to the Court he only declines to exercise the jurisdiction of the Court, and refers to the Court the summary jurisdiction which he himself has at Chambers. When, therefore, the Q. B. D. barred the claimant in the present case, they did so in the exercise of such summary jurisdiction, and so their decision was final and without appeal.

[NOTE.—*The Imp. and Ont. Rules are virtually identical. The sections of the Imp. C. L. P. Act, 1860, 23-24 Vic. c. 126, ss. 14, 17, also appear virtually identical with R. S. O. c. 54, ss. 5, 7.*]

THOMPSON v. SOUTH EASTERN RY. CO. SOUTH EASTERN RY. CO. v. THOMPSON.

Imp. J. A., 1873, s. 24, sub-s. 7—Ont. J. A. s. 16, sub-s. 8,

Consolidating of cross actions arising out of same matter—Principles of construction applicable to the Judicature Act.

Where two parties bring cross actions against one another, arising out of the same matter, and it is desirable to consolidate them under the above section of the Judicature Act, the proper criterion for determining which party ought to be made the plaintiff and which the defendant, and whose claim ought to be converted into a counter-claim, is not the largeness of the claim in the one case as compared with the other, neither is it priority of one party over the other in respect to the threatening or commencement of litigation, but the action brought against the party on whom the burden of proof lies ought to be stayed and the action brought by him ought to be allowed to proceed, the other party to the litigation being allowed to raise by defence, set-off, and counter-claim, all questions intended to be raised by him in the action which is stayed. At the same time this must not be considered a hard and fast rule, but the Court must use its discretion under the circumstances of each case.

March 29, C. A.—L. R. 9 Q. B. D. 320.

This was an appeal from the judgment of the Queen's Bench (Field, J., and Huddleston, B.), who, under the above circumstances, held that the party who had first issued a writ should be made plaintiff.

BRETT, L. J.—This seems to me to be a question of very great importance as to the administration of justice under the Judicature Act. I think the constant efforts of the Courts since the passing of the Judicature Acts have been, and I think have properly been, to so construe the Judicature Acts, and all the rules and orders under them, as to make as few absolute or unconditional, or what is called hard and fast rules, as can possibly be, and to make the interpretation of the Acts, and all the rules and orders, so large that the Courts can (unless they are prevented by the words of the Statute) exercise a discretion in each particular case, so as to do that which is most just and expedient between the parties. . . What is the meaning of sub-s. 7 of sec. 24 of Jud. Act, 1873 (Ont. Jud. Act, s. 16, sub-s. 8)? . . Now I desire to carry out what I have said has been the rule of conduct, as far as I know, in all the Courts and upon both sides of the Court of Appeal ever since the passing of these Acts. I desire to keep the exercise of the jurisdiction given to the Courts under this sub-s. 7 as large as I can, so as to enable the Court to do what is right and just in each particular case between the parties. I therefore think that there is no hard and fast rule, in the case of cross actions, that the one which was commenced last must be the one to be stayed. I think that the Judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties; if there is nothing to guide him, but who was the first to issue out the writ, I should say that it would be a wise and proper mode of exercising the discretion to give that party the advantage which he has got by his diligence. For instance, if the burden of proof (and I only give this as an instance) is as much on one side as on the other with reference to separate parts of the transaction, then I should think that the person who has issued the first writ would have gained the advantage, and that the action in which he is plaintiff ought to be the action which is to be carried on. But it seems to me that if all the substantial burden of proof is upon the person who is plaintiff in the action which was begun second, it is not conclusive as to a fair and just mode of trying the dispute between the parties to stay the action in which he would begin who has the substantial burden of proof as to all the controverted matters. It would be unfair to deprive him of being the plaintiff and so having the right to begin, and it would be hard to make him the defendant, although all the burden of proof lies upon him, ahd so to give his antagonist the power of anticipating him in matters which, but for the order of the Court, he could not do. Therefore, it seems to me that the Judge must consider what is the fair mode of trying that which is shown to be the substantial matter when it will come before the jury.

HOLKER, L. J.—In this case the Court of Appeal is called upon to exercise jurisdiction, so far as I know, for the first time under the powers conferred by the Judicature Act, 1873, s. 24, sub-s. 7. It is a jurisdiction not exactly to consolidate actions, but to prevent the multiplicity of actions, by directing that instead of there being two actions between the same parties, there should be only one. . . As far as I can make it out, the right to the first word and the last is not such a substantial advantage, as both these parties seem to think. But no doubt it is of importance that as the question has to be decided, it should be decided on clear and intelligible principles, and it is to my mind a very difficult question. It is difficult because the mind of the Court is left without very much principle to guide it, but my Lord has endeavoured to lay down some principle upon which a matter of this kind should be decided, and I must say that in all he has said upon that subject I agree with him. I do not think this is a case which can possibly be decided by any fixed rule or by any hard and fast rule. The circumstances from the beginning to the end must be heard; and in one case one consideration may have more weight, more cogency, and more effect than that same consideration may have in another. . . In such a matter as this I cannot be confident; but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial, and have the control of the action.

[NOTE.—*The Imp. and Ont. sections are identical.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

BENNETT v. GRAND TRUNK RAILWAY CO.

Trespass—Contributory negligence.

The servant of the plaintiff was in charge of an omnibus running to and from the station of the defendants' railway, and on the evening in question was attending at Georgetown station, at a distance of about nine feet five inches from the track, but was unable to see along the railway in either direction by reason of houses intervening. By leaving the omnibus, however, and going to the track he could have seen an approaching train; but omitting to take this precaution, although aware that a train was then due, he started off to cross the track, and did not hear or see anything of the approaching train until it was within about four feet of him, when he was unable to avoid the train, and the bus and harness of the horses were considerably damaged. It was not shown that the driver of the train had given any warning of the approach of it by sounding the whistle or bell on its nearing that part of the track where it crossed the road to the station. At the trial of an action brought to recover the amount of the damage done the omnibus and harness, the Judge of the County Court (Halton) non-suited the plaintiff, and subsequently, in term, refused to set the non-suit aside, considering that the negligence of the plaintiff's servant was the proximate cause of the accident.

Held, on appeal, [in this reversing the Court below] that the question of negligence on the part of the driver of the locomotive had been improperly withdrawn from the jury, and that a new trial must be had in order to submit that question to them.

Schoff, for the appeal.

J. K. Kerr, Q.C., contra.

DAVIS v. AUSTIN.

Tavern keepers—Supplying liquor after notice not to do so—Principal and agent—R.S.O. ch. 181—Assessing damages.

The plaintiff, whose husband was in the habit of drinking intoxicating liquors to excess, gave notice to the defendant, a duly licensed inn keeper, forbidding him to supply liquor to her husband; in consequence of which, it was alleged, defendant forbade his bar-keeper furnishing liquor to the husband; notwithstanding which the bar-keeper did serve plaintiff's husband with liquor in the tavern kept by the defendant.

Held, notwithstanding the alleged forbidding of the bar-keeper to furnish such liquor, the defendant was liable under the statute R.S.O. ch. 181, sect. 90.

On the trial of the action the County Court Judge (Norfolk) ordered judgment to be entered for the defendant on the ground that his bar-keeper had furnished the liquor contrary to the defendant's orders; the Court, on appeal, reversed such finding and directed a reference back to the Judge of the County Court to assess the damages, the Judge having a discretion to assess the same at any sum between $20 and $200, and the Court declined to follow the course adopted in the case of *Denny* v. *The Montreal Telegraph Co.*, 3 Ap. R. 628.

Falconbridge, for appellant.

Osler, Q.C., for respondent.

GRANT v. VAN NORMAN.

Insolvent debtor—Preferential assignment—Pressure.

V., who was a practising attorney and also Clerk of the Peace and County Attorney, having been ordered to pay over certain moneys, or in default be struck off the roll of attorneys, made an asssignment of his emoluments as County Attorney to H. W. and J. to secure the amount which he had been ordered to pay their client, at the same time telling H. W. and J. that he would leave it to them to hand him back such part as they chose on which to live, such an assignment being generally executed at the beginning of each quarter, upon which they drew the amount coming from the County and handed V. back a portion to live on. Subsequently V. recovered a judgment in favour of a client on which costs were taxed in his favour at $164, which he also assigned to secure an accommodation indorser. About a month afterwards the plaintiff G., as an execution creditor, obtained an attaching order.

Held, [affirming the judgment of SENKLER, J.]

that the existence of the order held by H. W. and J. was a sufficient pressure to prevent the assignment executed by V. being considered a preference within the meaning of the Act, (R.S.O. ch. 118).

Moss, Q.C., for appeal.

S. H. Blake, Q.C., contra.

BUIST V. MCCOMBE.

Damage feasant—Distress—Illegal sale.

The plaintiff and the defendant C. owned adjoining farms, and, owing to the want of proper fences between them, the plaintiff's cattle went upon and damaged the wheat of C., who distrained upon them damage feasant, but subsequently abandoned the seizure, and the same night they again trespassed on the land, doing some damage to the meadow, etc., C. thereupon again seized and impounded the cattle, claiming $10 for damage to wheat and hay. Ten days after the distress C. directed the pound keeper to sell, although proper notice of the seizure and intended sale had not been given. On the trial of an action brought for such alleged improper seizure and sale, the County Court Judge withdrew the case, except as to amount of damage, from the jury, and in term gave judgment in favour of C., but, under the circumstances, without costs. On appeal the finding as to C. was reversed, and judgment ordered to be entered against him as well as his co-defendant, he having, by improperly urging on the sale, rendered himself liable as a participator therein.

Osler, Q.C., and *A. D. Cameron*, for appeal.

H. J. Scott, contra.

REES V. MCKEOWN.

Replevin—Boarding-house keeper—Distress—R.S.O. 147.

In an action of replevin the defendant, for a second plea, avowed for board due by plaintiff to him as a boarding-house keeper; and for a third, avowed a lien on the goods of plaintiff under R.S.O. ch. 147, sect. 2. On the trial, before the Judge of the County Court (York) without a jury, the evidence as to whether the defendant was the keeper of a boarding-house, was contradictory; but the learned judge decided in favor of the plaintiff, holding that the defendant was not a boarding-house keeper. On appeal this finding of the County Court Judge was affirmed, although, had the matter come before this Court in the first instance it would have decided that the defendant was a boarding-house keeper, but, under the circumstances, gave no costs of the appeal to the respondent

Bigelow, for appellant.

Donovan, for respondent.

LAMBIERE V. SCHOOL TRUSTEES.

Public School Act—Meeting of Trustees.

In an action by a school teacher to recover a year's salary of $350, it was shown that the agreement to pay that sum was made in writing, and signed by two, of the three school trustees, but not at the same time or at any meeting of the trustees called for the purpose of transacting school business.

Held, reversing the judgment of the County Court (Haldimand), that the agreement was void as coming within sect. 97 of the Public School Act, which provides that "No act or proceeding of a school corporation which is not adopted at a regular or special meeting of the trustees, shall be valid or binding on any party affected thereby."

Robinson, Q.C., for appellant.

Hardy, Q.C., for respondents.

STEWART V. ROUNDS.

Principal and Agent—Agency to sell will not authorize agent to exchange goods of his principal—Replevin.

The plaintiffs delivered to one R. some cultivators for the purpose of selling, as their agent, for cash or good notes; three of these he exchanged with the defendant, who was aware of the fact of agency, for a buggy, which he sold and retained the proceeds. In an action of replevin the jury found in favour of the defendant, which the Judge, in term, set aside, and directed judgment to be entered for the plaintiffs, which was affirmed by this Court with costs.

Robinson, Q.C., for appellant.

MacBeth, for respondents.

MUTTON V. DEY.

Contract—Time.

The plaintiffs and defendant entered into an agreement in the following terms:—"I, the

undersigned, agree to deliver S. S. Mutton & Co. 40 M. ft. Blk. Ash, with mill-culls out, F. O. B. vessel on Cornwall Canal, @ $10 per M. ft. Also 10 M. ft. Soft Elm at $10 per M. ft., F. O. B. vessel on Cornwall Canal, to be delivered in the month of June, 1881, the lumber now on stick and part seasoned," and the plaintiffs signed a corresponding memorandum, agreeing to accept such lumber at the time specified.

Held, [affirming the ruling of the County Court Judge, (York)] that the plaintiffs were not entitled to inspect the elm with a view of rejecting culls, but were bound to accept as it stood, subject only to a proper measurement thereof.

The plaintiffs had not a vessel on the Cornwall Canal ready to receive the lumber on the first of June, nor until the month of September. The defendant, however, was willing then to deliver it, but the plaintiffs refused to accept unless subject to inspection.

Per OSLER, J.—Time, by the very terms of the memorandum itself, was of the essence of the contract, and the plaintiff was not bound to deliver the lumber in September.

Rose, Q.C., for appellants.

McDougall, for respondent.

JAMES v. BALFOUR.

Statute of Frauds—Promise to pay debt of another.

A promise to pay the debt of another, so long as that other remains liable, and such promise is, therefore, only collateral, must be in writing, even where there is a new and valuable consideration for such promise, otherwise it cannot be enforced against the promissor. Therefore, where the defendant had bought at sheriff's sale the stock of one A., who was indebted to the plaintiff for wages earned in A.'s employ, and in order to induce the plaintiff to continue such service with the defendant, he promised *to see that he was paid*, and the plaintiff did accordingly work for the defendant, who afterwards refused to pay the plaintiff's demand.

Held, [reversing the judgment of the County Court, (Welland)], that the defence of the Statute of Frauds was a bar to the action.

Rose, Q.C., for appeal.

Osler, Q.C., contra.

ELLIS v. THE MIDLAND RAILWAY.

Contract.

"The principle seems to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing, shall excuse the performance;" therefore, where the plaintiff was engaged by the defendants, for "the season," *i.e.*, from early in May till sometime in November, as master to manage the steamer *Idyl-Wyld*, and he continued so employed until September, when the steamer was burnt,

Held, that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon; and it appearing that he had already been paid more than the proper proportion, the Court reversed the decision of the County Judge (York), making absolute a rule to set aside the nonsuit granted at the trial, and for a new trial between the parties. But as this conclusion was arrived at on a ground not taken in the Court below, or suggested in the reasons of appeal, the Court refused the successful parties their costs of the appeal.

Lash, Q.C., for appeal.

Huson Murray, contra.

HUNTER v. VANSTONE.

Interpleader suit—Claimant not appearing—Judge's decision final.

In a proceeding against one P. the defendant made a claim to certain goods seized by the plaintiff, as bailiff, under execution, whereupon the Judge, on the final hearing, made a minute, "The claimant, not having put in his claim . . is barred, and is ordered to pay the costs incurred in fifteen days," in obedience to which the claimant did pay the costs of the interpleader but not the fees payable on the execution to the plaintiff as such bailiff, who thereupon instituted these proceedings.

Held, on appeal, [affirming the decision of the County Court Judge,] that the minute so made by the Judge in the interpleader issue, was final and conclusive upon the defendant, and that he could not be heard to say that the bailiff had not seized the goods of P.

H. J. Scott, for the appellant.

McCarthy, Q.C., for the respondent.

McLEAN v. PINKERTON.

Chattel Mortgage — Registration — R. S. O. ch. 119, sec.—Sunday last of five days.

A chattel mortgage was duly executed on the 12th of July, deposited in the post office on the 16th, and received by the clerk of the County Court on the 18th, the 17th having been a Sunday.

Held, [affirming the judgment of the County Judge, (Victoria)], that such registration was too late, the Act (R.S.O. ch. 119), requiring the same to be effected within five days from the execution of the instrument, and, therefore, that Sunday counted as one of such five days, so that the registration should have been effected on the 16th.

Rose, Q.C., and *F. Hodgins*, for appeal.

Gibbons, contra.

STOESER v. SPRINGER.

Replevin—Fraudulent purchase—Disaffirming sale.

T. sold a horse, buggy and harness to M., who paid for them by two promissory notes, one his own, and having been informed that M. was worthless, he went and demanded back his goods, at the same time throwing the notes on the table. On the assurance of M., however, that all would be right, T. again took up the notes and went away. Subsequently the plaintiff, without any knowledge of how M. had obtained the goods, traded for them, giving M. $50 cash, in addition to his own horse and buggy. T. afterwards, on ascertaining that he had been deceived, sued out a writ of replevin and retook the goods.

Held, [affirming the judgment of the County Court, Waterloo], that the plaintiff, being a *bona fide* purchaser before any actual disaffirmance of the sale by T., was entitled to retain possession thereof.

McCarthy, Q.C., for the appeal.

J. K. Kerr, Q.C., contra.

GRASS v. AUSTIN.

Fraudulent preference—Mortgagor and Mortgagee.

M., the purchaser of land, executed a mortgage thereon for about $2,500 of the purchase money, and having allowed the interest to run in arrear till it amounted to $750, executed a chattel mortgage in favour of his vendors, including grain and hay, as also all the crops and hay sown or to be sown during that year, and subsequently a creditor of M. obtained an execution against him, whereupon the sheriff obtained an order of interpleader. On the trial before the Judge of the County Court (Northumberland and Durham) a verdict was entered for the plaintiffs subject to the opinion of the Judge on the whole case, who subsequently sustained such verdict. On appeal this decision was affirmed, but as there were some articles in the possession of the debtor not covered by the chattel mortgage the Court refused to allow the respondent more than half the costs of such appeal.

Bethune, Q.C., for the appellant.

J. K. Kerr, Q.C., and *Skinner*, for respondents.

QUEEN'S BENCH DIVISION.

Osler, J.] [June 5.

MILLAR v. HAMELIN AND WIFE.

Statutes of Limitations—Acknowledgment—Estoppel.

Hamelin, being seised of land subject to a mortgage to L. dated 14th October, 1863, and to one to M. dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, Hamelin obtained his discharge; on 27th January, 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in the mortgage to F. H. to the use of his wife, his co-defendant. On 12th April, 1869, L. assigned his mortgage to Mulholland, who, on 28th March, 1873, assigned it to W. In 1879 Hamelin, having procured assignments to himself of a number of the claims against his insolvent estate, presented a petition signed by himself to compel W. to wind it up. He alleged that Mulholland held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right title and interest of the insolvent in the land, and the advertisement further stated that the purchaser would acquire only such title

as the vendor had as assignee. Hamelin attended at the sale, and objected to the sale of the land, and bid for the same, and the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to Hamelin as assignee of the claims against his estate. Hamelin and his wife remained in undisturbed possession from his discharge in insolvency.

Held, that Hamelin was not estopped from setting up a title by possession by reason of the manner in which the sale was brought about; that the acknowledgment of the L. mortgage by Hamelin's petition was not sufficient to stop the running of the Statute, because by assignment of the M. mortgage to Hamelin, and the latter's conveyance under the power to his wife, she became, and was at the time of the petition, the owner of the equity of redemption, and was not affected by her husband's acknowledgment, and therefore the plaintiff failed.

P. O'Brian for the plaintiff.

E. T. Dartnell for the defendant.

Cameron, J.] [Sept. 22.

IN RE THE TOWNSHIP OF SARNIA AND THE TOWN OF SARNIA.

Extending the limits of town—Arbitration—Drainage assessment—Award against township invalid.

A portion of the Township of Sarnia was added to the Town of Sarnia by proclamation of the Lieutenant-Governor. The former municipality was indebted to the Province of Ontario for certain drainage works, under the provisions of R. S. O. cap. 33, which works had benefitted certain roads in the Township. The arbitrators, in settling the matters of dispute between the two corporations, were of opinion that the drainage assessment was not a proper subject of arbitration, and made their award without adjudicating thereon.

Held, that the award was invalid, for the drainage assessment was an ordinary debt, payable out of the general funds of the Township, under R. S. O. cap. 33, to which the Town of Sarnia should contribute a just proportion, under R. S. O. cap. 174, sec. 53.

The award as made directed the Township to pay a certain sum to the Town.

Held, bad; for the only terms upon which the acquisition of adjacent lands can be had by a Town are contained in R. S. O. cap. 174, sec. 53, which only authorizes a payment by the Town to the Township or County.

Robinson, Q.C., for the award.

Aylesworth, contra.

IN RE BRONSON AND THE CITY OF OTTAWA.

Railway — Point of commencement — "From," meaning of—Eminent domain—Expropriation of lands already devoted to public purposes.

The charter of the C. A. R. Co., reciting in the preamble that the line of Railway which it was proposed to construct would afford the shortest and most convenient connection between the Cities of Ottawa and Montreal, authorized the Company to construct their track *from* the City of Ottawa.

Held, that they had the right to enter the City and construct from a point within its limits.

The City passed resolutions providing for a lease of right of way to the Company over lands expropriated by the City for waterworks purposes under 35 Vict. cap. 80 (O).

Held, that though, *prima facie*, the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to public uses, or already expropriated under other Acts, yet under some circumstances the right to make such expropriations might exist, and if so, then the city would have the corresponding power to convey. And as the applicants had not shown to the Court that circumstances did not exist under which the Railway Company could take the land, the Court would not assume that the City had committed a breach of trust in passing the resolutions

The railway was to cross certain streets at a grade different from that required by the Railway Act, but the resolutions provided that the streets should be graded up to the railway.

Held, objectionable.

Robinson, Q.C., and *Christie*, for the motion.

McCarthy, Q.C., and *Gormully*, contra.

CHANCERY DIVISION.

Ferguson, J.] [Oct. 3.

BANK OF MONTREAL v. HAFFNER.

Mechanics' Lien Act—R. S. O. c. 120—Parties—Priority.

Where a suit was brought to enforce a mechanics' lien on certain property, and one A., who acquired a similiar lien on the said property for work done subsequently to the commencement of the said suit, was made a party thereto in the Master's office, but failed to prove any claim therein.

Held, A. should not have been made a party to the said suit, and the fact of his not proving any claim was no bar to his subsequently commencing a suit to enforce the said lien so acquired by him.

Wallbridge v. *Martin*, 2 Ch. 275, approved of.

Held also, A. was entitled to priority over a mortgage created on the property, previously to the doing of the work in regard to which he claimed a lien, in respect of the increased value of the lands by reason of the improvements, viz., the work done and the materials provided.

Every lien holder is, under the said Act, entitled to security upon the enhanced value arising by reason of his work and materials.

Broughton v. *Smallpiece*, 25 Gr. 290, approved of.

Judgment directed to be settled in the light afforded by the case of *Downer* v. *Mix*, referred to in Mr. Holmested's Mechanic's Lien Act, p. 67.

D. McCarthy, Q.C., and *Cameron* for the plaintiff.

W. Cassels and *Mowat* for defendants.

[NOTE.—*A demurrer in this suit was disposed of some time since, as reported 29 Gr. 319.*]

Ferguson, J.] [Sept. 26.

MCDONALD v. OLIVER.

Contract—Construction—Condition precedent.

On February 9, 1875, the defendants entered into a certain contract with the Government for the construction of certain works in connection with the Canada Pacific Telegraph line. On August 2, 1875, the plaintiff entered into a subcontract with the defendants to construct certain parts of the said works. This latter contract stated that the work to be done by the plaintiff should be done on such route as the Government engineer in charge should point out; and the defendants covenanted (subject to the conditions thereinafter set out) with the plaintiff that they would pay him for the whole of the work contemplated to be done and performed by him at the rate mentioned per mile. The parties then declared that the contract was entered into upon the express conditions that followed, the first of these stating that the payments should be made to the plaintiff within twenty days after the estimate of the engineer or officers in charge on behalf of the Minister of Public Works to be, from time to time, put in by him to the Minister, specifying the amount of work done to the satisfaction of the Minister, etc., during the month then ended and past, and a copy of such certificate served upon the defendants.

Held, the above first condition alone, apart from the other parts of the contract, was sufficient to make the obtaining of the estimate of the engineer or officer, and service of a copy of it on the defendants, a condition precedent to the plaintiff's right to recover for work done under the contract.

Roaf, for the plaintiff.

Bethune, Q.C., for the defendants.

Boyd, C.] [Oct. 11.

STUART v. TREMAINE.

Fraudulent preference—Pressure——R. S. O. ch. 118—Transfer to third party.

Where one creditor sought to set aside a transfer of goods to another creditor as a fraudulent preference, and it appeared that the impelling cause which led to the transfer was the application of the latter to be paid or protected,

Held, the transfer was not "voluntary" in the sense in which that word is used in the statute R. S. O. c. 118.

Where, moreover, it appeared that the latter had transferred the goods for value to a third party before the transaction between the debtor and himself was impeached.

Held, he could not be made to account for the proceeds as if he where a debtor of the plaintiff. Under the statute the plaintiff's only remedy was to have any obstruction removed which impeded the operation of his writs of execution; his pursuit of the goods, exigible in execution, failed when a *bona fide* sale took place. *More-*

wood v. *South Yorkshire Ry. Co.*, 3 H. and N. 798, and *Totten* v. *Douglas*, 18 Gr. 346, followed.

Ferguson, J.] [Sept. 23.

SWAINSON v. BENTLEY.

Will—Gift of maintenance—Qualifying clause.

A testator devised certain lands to his two sons, declaring that the legacies thereinafter mentioned shouid be a charge thereon; he then bequeathed certain pecuniary legacies to his daughters, adding, "I give and devise also unto" [his said daughters] "their support and maintenance so long as they, or either of them, remain at home with" [his two sons,] and he gave his personal property to his two sons in equal shares.

Held, the support and maintenance of the plaintiffs was, by the will, made a charge upon the lands; and they might, for sufficient reasons, cease to live at home, and yet still be entitled to such support and maintenance.

S. H. Blake, Q.C., for the plaintiffs.

G. M. Rae, for the defendants.

Ferguson, J.] [Oct. 3.

MOORE v. MELLISH.

Will—Charge on land—Purchase from executor—Unlimited trust.

In this case the testator, after directing that his funeral charges and his debts should be paid by his executor, disposed of the residue of his real and personal estate as follows:—First, he gave and bequeated certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor.

Held, (i.) the legacies were, by the will, charged upon the estate real and personal, and failing personal estate, became a charge upon the land.

(ii.) W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money, for otherwise the purchaser would be required to see to the performance of an unlimited trust, viz., the payment of the debts, and this the authorities show will not be required in such case.

Moscrip, for the plaintiff.

E. Martin, Q.C., for the defendant.

Boyd, C.] [Oct. 11.

SWAISLAND v. DAVIDSON.

Promissory notes—Restricted negotiability—Mutilation—Innocent holder.

The defendant, on purchasing certain patent rights, gave the vendor, one C., two promissory notes for the purchase money, which notes, however, he stipulated should not be disposed of during their currency. The notes were, on their face, payable to C. or bearer, but to carry out the above stipulation the words "the within notes not to be sold," were endorsed upon both notes, contemporaneously with their making; and the evidence showed that the face and back of both the notes must be read together as forming the contract between the parties. Moreover, it appeared that when the notes were brought to the plaintiff the word "not" had been erased in one of them, so that the endorsement read, "This within note to be sold;" and in the case of the other note, the words endorsed,' being at the end of the paper, were torn off, but without destroying any part of the face of the note.

Held, (i.) whether the memorandum qualifying the effect of the notes was under-written or endorsed was immaterial, so long as it was a part of the original contract; and the materiality of the endorsement, in this case, appeared sufficiently from the circumstances, and had the effect of providing against a disposing of the notes to a holder for value, so as to preserve to the maker all defences and equities as against the first holder, or volunteers under him, and thus qualified the negotiability of the notes.

(ii.) The erasure and excision were each material alterations of the notes, destroying their value as securities, and discharging the defendant from liability thereupon; and inasmuch as the notes were issued in a perfect state, with no blanks, it could not be maintained that the defendant was negligent in allowing the endorsement to be put at the end of the paper where it could be so easily torn off, and that, therefore, he, the defendant, should suffer instead of the plaintiff, for the doctrine of negligence should not be applied to cases of perfect instruments like the present.

(iii.) Considering the plaintiff's occupation, and the circumstances under which he took the notes, and the suspicious appearances of the notes themselves, he could not be regarded as an innocent holder of the notes.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Sept. 11.

LUCAS v. ROSS.

Special endorsement—Rule 80, O. J. A.—Motion for final judgment under Rule 80, O. J. A.

The writ was endorsed as follows: "The plaintiff's claim is for the price of goods supplied. The following are the particulars: $621.06 for money payable by the defendant to the plaintiff, for goods bargained and sold and delivered by the plaintiff to the defendant, and interest thereon from the 25th July, 1882."

Held, by the Master in Chambers, that the endorsement was not a sufficient special endorsement to entitle the plaintiff to judgment under rule 80.

Leave given to annul and renew motion ten days from service of amended writ.

Aylesworth for the motion.

Holman, contra.

Boyd, C.] [Oct. 9.

RE LOVE.

Infants—Examination—R. S. O. cap. 40.

An application for the sale of of infants' estate under R. S. O. cap. 40. The property was situated in the Town of Lindsay, and was shown to be worth about $400. There were five infants. Three of them, who were over fourteen years, had been examined before the Master at Lindsay. The other two were residing with their mother in the United States, whose affidavit, as to their age and her inability to produce them in Ontario owing to the expense, was filed.

J. H. Macdonald, for the application, submitted that the Court had a general power to relax the rule as to examination, as in similar cases were the estate was large commissioners to examine had been allowed.

BOYD, C., granted the application dispensing with examination of the two infants who were out of the jurisdiction.

ONTARIO GLASS CO. v. SWARTZ.

Division Court—Jurisdiction.

Motion for the prohibition to the 1st Division Court of the County of Kent, to stay proceedings under a judgment obtained by the plaintiff against the defendant, an American citizen.

Held, that the process of Division Courts is of no effect outside the Province of Ontario.

Clement, for the motion.

Aylesworth, contra.

SCOTT v. CREIGHTON.

Contents of statement of claim—Omission of date of writ—Rule 128, O.J.A.—Ejectment.

The defendant moved to set aside the statement of claim, on the ground that it did not mention the date on which the writ issued, as provided by forms in appendix D. to rules O.J.A.

Murray, contra.—The rule merely says "forms may be used," and it is not therefore compulsory to follow the form verbatim.

Held, that the mention of the date of issue of writ was essential; but leave was given to amend on payment of costs, which were fixed at $1.

FLETCHER v. NOBLE.

Division Court—Security for costs—Prohibition.

A motion for a prohibition. The plaintiff resided in the United States of America, and brought his action to the 10th Division Court of the County of York to recover $128, the amount of a promissory note and interest.

The defendant obtained an order for security for costs.

Held, that under sec. 244, cap. 47, R.S.O., a judge of a Division Court has power to order security for costs.

Murray and Barwick, for motion.

Gould, contra.

Boyd, C.] [Oct. 10.

AITCHESON v. MANN.

Venue - 35 Vict. cap. 26.

An action to restrain the infringement by the defendant, who resided and carried on business in Brockville, of a patent granted to the plaintiff under 15 Vict. cap. 26.

The plaintiff resided at Belleville, and laid the venue there.

Held, that the venue must be laid at Brockville under the statute.

Order accordingly, costs in the cause.

Hoyles, for the defendant moving.

Langton, contra.

BOOK REVIEW.

The Ontario Law List and Solicitors' Agency Book. 9th edition. Toronto: J. Rordans & Co., 1882.

This little book is so useful, not to say indispensable, to the profession that it certainly deserves a short notice, now that it has broken out in a fresh place, in the form of a new edition. The present edition commences with a short essay on the main characteristics of the novelties in practice introduced by the Judicature Act, which is well worth reading. Amongst other things, also, it comprises a Manitoba Law List, giving the firm names, and also the roll of Manitoban barristers and attorneys, alphabetically arranged. It would be well if Messrs. Rordans, in their next edition, followed the same plan with the Ontario lawyers, and gave not only the firm names, but also a complete alphabetical list of all Ontario barristers and solicitors. Without that it is sometimes a little troublesome to find out a country practitioner unless you happen to know beforehand exactly the town or village where he practices. Again, should you know no more than that you wish to communicate with a certain lawyer of the name of "Smith," who practices somewhere in the country, but you do not happen to know where, or his initials, it may be desirable to be able to find out if there is more than one "Smith" practising in Ontario.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Telegrams and telegraph—Corroborative evidence.—*Central L. J.*, Sept. 8.
Partnership—Firm name on accommodation paper.—*Ib.*, Sept. 22.
Proof by inspection.—*Ib.*
Mental suffering as an element of damages.—*Ib.*, Sept. 29.
Presumptions of life and death.—*Ib.*
Fear: its legal limitations.—*Ib.*, Oct. 6.
Malicious prosecutions.—*Ib.*
Right of costs out of particular estate or fund in litigation.—*Irish Law Times*, Aug. 26.
Landlord's action for nuisance to premises.—*Ib.*
Venue in criminal cases.—*Ib.*, Sept. 23.
Misconduct of juries.—*Ib.*
Conflicts of laws and bills of exchange.—*American Law Review*, July.
Support, lateral (adjacent) and subjacent.—*Ib.*
The proximate cause of death in accident insurance policies.—*Ib.*
Proof of handwriting.—*Ib.*, Aug.
Specific performance of contracts for the sale of shares in corporations.—*Ib.*
Charter parties.—*Ib.*, Sept.
Promoters of companies as corporate fiduciaries.—*Ib.*
Charter parties.—*Ib.*, Oct.
Conflict between federal and state decisions.—*Ib.*
Dentists.—*Albany L. J.*, July 22.
A history of the English judicature.—*London L. J.*, Aug. 12, *et seq.*
The conveyance of rights of entry.—*Ib.*, Aug. 19.
Evidence of reputation in libel.—*Ib.*
The preliminary investigation of crime.—*Criminal Law Review*, May.
Seduction as a crime.—*Ib.*
The doctrine of materiality in the law of perjury.—*Ib.*, July.
Jurors as judges in criminal cases.—*Ib.*

FLOTSAM AND JETSAM.

The following is from Nova Scotia, published as an advertisement in a newspaper there, and is almost as rich as some of the effects produced by the hybrid race in Ontario:—

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—*Michigan paper.*

Canada Law Journal.

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DIARY FOR NOVEMBER.

1. Wed.. Second Intermediate Examination. All Saints Day.
2. Thus.. First Intermediate Examination.
3. Fri.... First Intermediate Examination. Draper, C. J., died 1877.
5. Sun... *22nd Sunday after Trinity.* Sir J. Colborne, Lieutenant Governor U.C., 1838.
7. Tue... Primary Examination.
8. Wed.. Primary Examination.
9. Thrs.. Prince of Wales born, 1841.
12. Sun... *23rd Sunday after Trinity.*
14. Tue... Court of Appeal sittings begin.

TORONTO, NOV. 1, 1882.

WE publish in the Law Student's Department the dates of the forthcoming Michaelmas Term Examinations.

THE latest addition to Osgoode Hall Library is a new edition of Wilson's Judicature Act, which will be very welcome. It brings the notes of cases up to June last.

MR. JOHN PEARSON, Q. C., one of the leaders in Mr. Justice Fry's Court, has been appointed to the vacant Judgeship in the Chancery Division of the High Court of Justice in England, caused by the recent resignation of Vice-Chancellor Hall. Mr. Pearson, who was educated at Caius College, Cambridge, was called to the bar at Lincoln's Inn in 1866. The new judge will be liable to go circuit.

AN advertisement of the Law Society recently published in the *Globe* and *Mail*, announces that applications will be received by the Secretary until Wednesday, Nov. 15th next from members of the Bar desirous of being appointed to the office of Practice and Chamber Reporter. A warning is added in accordance with the now habitual and just practice of Convocation, that no application is to be made to any Bencher on the subject.

SUBROGATION OF INSURANCE COMPANIES TO THE RIGHTS OF MORTGAGEES.

HOWES V. THE DOMINION FIRE INSURANCE CO.
KLEIN V. THE UNION FIRE INSURANCE CO.

It is, apparently, a common practice both in this country and the United States, for loan companies to enter into arrangements with insurance companies of the following nature. The loan company undertakes, so far as it is in its power, to cause properties mortgaged to it to be insured in the insurance company under the covenant to insure as collateral security, commonly contained in mortgages. The insurance company in return for this agrees to grant the loan company what are called "unconditional" policies, and to carry this out, a "subrogation" or "unconditional" clause is included in the policies taken out by or through the instrumentality of the loan companies. Such subrogation clauses are worded in some such way as follows:—"It is hereby agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy. It is also agreed that whenever the company shall pay to the mortgagee any sum for the loss under this policy, and shall claim that as to the mortgagor or owner, no liability therefore existed, it shall at once and to the

extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made under any and all securities made by such party for the payment of said debt; but such subrogation shall be in subordination to the claim of the said party for the balance of the debt so secured, or said company may, at its option, pay to the mortgagee the whole of the debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made, an assignment and transfer of said debt, with all securities held by said party for the payment thereof."

The right of the insurance companies to subrogation to the right of mortgagees both when there is and when there is not such a subrogation clause in the policies of insurance, has come before the courts in the United States in several cases and also before our own, though there appears to be little English authority forthcoming on the subject. The most recent instances in which the matter has come up in our own Courts are the cases of *Howes* v. *The Dominion Insurance Co.*, before Proudfoot. J., noted *supra*, p. 264; and *Klein* v. *The Union Insurance Co.*, before Ferguson, J., *supra*, p. 344, neither of which are yet reported in the Ontario Reports. It may be useful, in connection with these decisions, to state what appears to be the principles which govern the subject, referring to such Canadian and American cases as seem most clearly to illustrate them.

The fundamental principle in relation to the subrogation of insurance companies appears to be as follows:—(i) Where the insurance company stands really in the position of a surety by reason of the insurance being one merely of the interest of the mortgagee, there there is always a right of subrogation in favour of the insurance company. Thus in *Excelsior Fire Insurance Co.* v. *Royal Insurance Co.*, 55 N. Y. 343 (1873), it is laid down at p. 359:—"It is settled that when a mortgagee or one in a like position towards property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss happens to it, the insurer on making compensation, is entitled to an assignment of the rights of the insured. This is put upon the analogy of the situation of the insurer to that of a surety." So, too, the same principle is illustrated by *Foster* v. *Van Reed*, in Appeal, 70 N. Y. 19 (1877), a case specially referred to and discussed by Proudfoot, J., in *Howes* v. *Dominion Insurance Co.* See also, per Richards, C. J., in *Reesor* v. *Provincial Insurance Co.*, 33 U.C.R. 358; and also a number of American cases cited in an article in the American Law Register, Vol. 18, p. 737. (ii) But where the insurance company does not stand thus in the position merely of a surety, but rather in that of a principal debtor, the insurance being on the property, and so enuring to the benefit of the mortgagor, as well as of the mortgagee, there is no right of subrogation in favour of the insurance company, *unless a contract to that effect has been agreed to by the mortgagor himself.* Thus in *Waring* v. *Loder*, 53 N.Y. 581, and in *Ulster County Savings Institution* v. *Decker*, 18 S. C. N. Y. 515, the mortgagor had not consented to or ratified any such agreement, and, therefore, there was held to be no right of subrogation. For the general rule is quite clear that the assignee of a mortgagee takes it subject to all equities affecting it in the hands of the mortgagee: *McPherson* v. *Dougan*, 9 Gr. 258; *Elliott* v. *McConnell*,, 21 Gr. 276; *Pressey* v. *Trotter*, 26 Gr. 154; and it is manifest that as against the mortgagee, the mortgagor in the absence of special agreement, is entitled to have the amount paid by an insurance company to the mortgagee on a policy effected for his (the mortgagor s) benefit, credited to him on his mortgage: Wood on Insurance, Ed. 1878, sec. 471.

But in *Springfield Fire and Marine Insurance Co.* v. *Allen*, 18 S. C. N. Y. 389, and in *Klein* v. *The Union Insurance Co.*, *supra* p. 345, in which Ferguson, J., specially refers to

Springfield Fire and Marine Insurance Co. v. *Allen* as a parallel case, as, also, in *Springfield Fire and Marine Insurance Co.* v. *Brown*, 43 N. Y. 389, and it may be conjectured in *Westmacott* v. *Hanley*, 22 Gr. 352, the policy contained a subrogation or unconditional clause, such as is set out above, and it was held that the mortgagor being privy to this agreement as to subrogation, *and having done that which avoided the policy as regards himself*, the insurance company were, on paying the mortgagee his loss, entitled to be subrogated.

In *Howes* v. *The Dominion Insurance Co.*, however, the mortgagor had done nothing to avoid the policy, which was a general insurance of the property, and not merely an insurance of the mortgagee's interest; and, therefore, he was held entitled to be allowed credit on the mortgage in the hands of the insurance company for the amount paid by them to the mortgagees on the policy. For under the subrogation clause, the insurance company is only to be subrogated to the rights of the mortgagees as to payment made on the policy, when it can claim that as to the mortgagor no liability therefore existed; in other words, when the mortgagor has done something to avoid the policy, and the insurance company has paid the mortgagee merely because the policy is unconditional as regards him.

Lastly, seeing that so much depends, as regards subrogation, on whether the insurance is an insurance of the mortgagee's interest only, or of the property generally, and therefore for the ultimate benefit of the mortgagor also, it is interesting to see that in *Howes* v. *The Dominion Insurance Co.*, Proudfoot, J., observes, *supra* 264, that the unconditional clause itself affords some evidence that an interest in the mortgagor was recognised by the contracting parties, and that the insurance company were not merely insuring the debt due the mortgagees.

A. H. F. L.

RECENT ENGLISH DECISIONS.

STATUTE OF LIMITATIONS—FRAUD—JUDICATURE ACT.

Proceeding with the July numbers of 9 Q. B. D., the next case requiring notice is *Gibbs* v. *Guild*, p. 59, in which the decision of Field, J., in the Court below, noted *supra*, p. 145, is affirmed by the Court of Appeal. The action was for damages for fraudulent representations alleged to have been made by the defendant, whereby the plaintiff was induced to purchase certain worthless shares in a Company, and the point of law raised by the pleadings may be recalled by referring to p. 154 *supra*. Lord Coleridge, C.J., and Brett, L.J., now held that the decision of Field, J., was correct. Both Judges agreed that the cause was one which before the Judicature Act might have taken the form either of a common law action or of a proceeding in equity; and that, in the former case the Statute of Limitations would, so far as existing authorities were a guide, have been held a bar, but in the latter case, not; yet that since the Judicature Act they were bound to see what the Court of Equity would have done, and apply that relief, although the action had been carried on in a common law division. The judgments are of special interest by reason of the remarks they contain on (i.) the way Courts of Equity dealt with the Statute of Limitations; (ii.) the effect of the Judicature Act. As to (i.), Lord Coleridge repudiates the notion that Courts of Equity engrafted an exception upon the Statute of Limitations, in the sense that they altered the terms of the Statute. He says:—"I understand the Courts of Equity to deal with the Statute of Limitations, as they deal with every other legal right, whether existing by statute or common law, not by abrogating it, but by saying, on principles well understood in these Courts, that in some particular cases it is unjust that the party should be allowed to exercise those rights" Brett, L. J., appears to take the same view. He says: "In cases in which the only remedy was in the Court of Equity,

but where the transaction was such as was within the meaning of the Statute of Limitations, it is admitted, and cannot be denied, that the Courts of Equity, whether by analogy or whether they considered themselves bound by the Statute, . . did recognise the binding authority of the Statute of Limitations, and if there were nothing else but the cause of action, and the cause of action had arisen more than six years before the commencement of the suit, the Courts of Equity interpreted the Statute of Limitations precisely in the same way as Courts of Law did. But assuming that the Statute of Limitations would be binding, the Courts of Equity, on doctrines of their own, sometimes applied, if other circumstances arose, a particular kind of equity. . . They said, if the existence of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground that the Statute was a bar." And it is here that Holker, L. J., differs from his colleagues, and so arrives at a contrary conclusion on the whole case. He says: "I think the authorities show that, *wherever there was a proceeding in equity which came within the description of the proceeding mentioned in the Statute of Limitations*, there the Courts of Equity held themselves to be just as much bound by the strict language of the Statute as the Courts of Law were, for Acts of Parliament are omnipotent, and are not to be got rid of by declarations of Courts of Law or Equity. . . In the case of a proceeding *not within the Statute of Limitations*, where the question has arisen whether the Statute shall run from the perpetration of a fraud or from its discovery, the Courts of Equity have said the Statute shall run from the discovery. . . The present case is in effect *an action on the case* to recover back money obtained by fraud, and it is proposed to declare by a decision of a Court of Justice that the rule which the Statute of Limitations has established shall be done away with, and that where that Statute of Limitations says that the Statute shall begin to run from the arising of the cause of action, this Court is to declare that instead of that the Statute shall begin to run from the discovery of that fraud. I am, therefore, unable to concur with the other members of this Court that the judgment should be affirmed." The above seems to bring into a clear light the important point of law in which Holker, J. dissents from the other Judges, which is not obvious from a first reading of the case, and is in no way indicated in the head-note. As to (2), space only permits the remark that the ground is taken by Brett, L. J., and the same view seems implied in the other judgments, that the Judicature Act has not altered the rights and remedies of any person—and does not repeal or alter the effect of any Statute which was applicable before to a particular case."

LANDLORD AND TENANT—NEGLIGENCE.

In *Ivay* v. *Hedges*, p. 80, it appeared that the defendant, being owner of a certain house, let apartments in it to lodgers, and allowed them the privilege of using the roof, which was flat, for the purpose of drying their linen. The roof had a rail round the edge, which, as the landlord knew, was out of repair. The plaintiff, one of the lodgers, went on to the roof to remove some linen, slipped, and the rail breaking, fell through to the court-yard below, and was injured. The Divisional Court now held no liability rested on the landlord. Lord Coleridge, C. J., says: "If there had been an absolute contract for the user of this place in a particular way, it might be that the defendant would have been liable for not keeping it in a safe condition. But if the contract was, as we must take it to be—I let you certain rooms, and if you like to dry your linen on the leads you may do so; in that case the tenant takes the premises as he finds them. No case has been cited in the English Courts which has the least bearing on the matter."

Recent English Decisions.

BILL OF EXCHANGE—ILLEGAL CONSIDERATION—COMPOUNDING FELONY.

Of the next case, *Flower* v. *Sadler*, p. 83, it need only be said that it is on the same lines, and follows the principle adopted in *Ward* v. *Lloyd*, 7 Scott, N. R. 499, both cases enforcing the proposition that when there is a debt actually due, though incurred under circumstances which might subject the debtor to a criminal prosecution at the hands of his creditor, as *e.g.* in the case of a defaulting agent, the mere use of language by the creditor, threatening prosecution, is not alone sufficient to vitiate the security shortly afterwards given by the debtor to the creditor, on the ground of their constituting an illegal agreement compounding a felony, or on the ground that they were obtained by threats—and this though the creditor did as a matter of fact, after receiving them, abstain from prosecuting.

COSTS—INTERLOCUTORY PROCEEDINGS—STAY TILL PAYMENT.

In the next case, *Morton* v. *Palmer*, p. 89, it appeared that an action had been tried and resulted in a verdict for the plaintiff. The Divisional Court refused to grant a rule *nisi* for a new trial, but the Court of Appeal granted a rule absolute for a new trial, the costs of the first trial to abide the event, and the rule continued, "And it is further ordered that the plaintiff do pay to the defendant or his solicitor the costs of this appeal, and of the application to the Divisional Court to be taxed by the Master. The costs of the motions were taxed but not paid, and the defendant thereupon applied to a Master for *a stay of proceedings till the costs should be paid*, and the Master made the order, which was confirmed by a Judge at Chambers. The Divisional Court now held that the Master had no right to interpolate a condition which the Judges of the Court of Appeal did not impose. Cave, J., says:—"It was first contended that the defendant is entitled to such stay as a matter of right, and that we have no discretion to refuse it. I cannot accede to this argument . . . Mr. Harrison says that this right has been recognized and acted upon in the Court of Chancery. But on looking at the cases he was referred to, I cannot find that any such rule has ever been laid down or even suggested. It was next contended that, in the exercise of our discretion, we ought to stay proceedings until these costs have been paid." He then refers to cases shewing the former practice in Courts of Chancery and Common Law, and says: "The principle of the practice in each Court was the same, viz., that if a litigant had brought an action or made a motion against another and had failed he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding. This practice, however, is no justification for our making such an order in this case. The plaintiff here is not seeking to try over again something in which he has failed before. . . I am of opinion that there is no rule of practice which could justify us in doing what the Court of Appeal has not done, and making his right to go to a second trial conditional on his paying those costs."

Passing by *The Queen* v. *Ganz*, p. 93, which is an interesting case relating to the proper construction of the extradition treaty between the United Kingdom and the Netherlands, the next case arresting attention is *Pulling* v. *Great Eastern Railway Co.*, p. 110.

DAMAGE OF INTESTATE'S ESTATE FROM INJURY TO HIS PERSON.

Here an administrator sued a railway company for damages on the ground that his intestate was, through their negligence, run over by an engine, whereby he incurred medical expenses and loss of wages, whereby his personal estate was dimished in value. A demurrer to the statement of claim was now upheld, Denman, J., saying, with the concurrence of Pollock, B.: "I do not think we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim, "*actio personalis moritur cum persona.*" To a certain extent

that doctrine has been justified. . . But none of the authorities go so far as to say that, when the cause of action is in substance an injury to the *person*, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. . . There is no decision which supports the proposition that, because in consequence of an injury to his son the person injured is put to expense, the case is brought within the category of cases to which 4 Edw. III. c. 7 applies."

The last case in this number of the Queen's Bench Division still remains to be briefly noted.

SALE OF RIGHT OF ENTRY—32 HEN. 8, C. 9, S 2—R.S.O. C. 98 S. 5.

The name of the case is *Jenkins* v. *Jones*, p. 128, and the Court of Appeal had to decide in it, whether a *bona fide* right of entry to to land could be validly sold by one who had never been in possession. On the one side it was argued, such a sale was illegal by reason of 32 Hen. VIII, c. 9, s. 2; on the other side it was argued that rights of entry could be thus sold since Imp. 8-9 V., c. 106, s. 6, (R.S.O. c. 98, s. 5). Section 2 of the Act of Hen. VIII. enacts that no person shall buy or sell any pretenced rights or titles, or take, grant or covenant to have any right or title of any person in or to any lands, except such person who shall so sell, grant, covenant or promise the same, their ancestors, or those by whom they claim have been in possession of the same, or of the reversion or remainder thereof, or taken the profits for one year before the said bargain, covenant, etc., on pain of forfeiture of the lands in question. Cotton, L. J., in delivering the judgment of the Court, discusses the meaning of this Statute of Henry VIII. by the light of the authorities, and shows that it was only in affirmance of the common law, and arrives at this conclusion: "All dealings with right of entry, except by release to the person in possession, were previously to 8-9 Vict. c. 106, dealings with 'pretenced' rights and titles within the meaning of the Act of Henry VIII. But the Act of the Queen has enabled rights of entry to be conveyed, and since that Act a right or title, good in fact—that is, not fictitious—is not a 'pretenced' title within the Statute, simply because it is a right of entry. . . Although in our opinion it is incorrect to say that 8-9 Vict. c. 106 has repealed 32 Henry VIII. s. 2, it has this effect, that the deed of July, 1877 (by which the right of entry was conveyed), cannot be considered as dealing with a 'pretenced' right or title within the meaning of that Act."

The remaining July numbers of the Law Reports, at present unreviewed, comprise 7 P. D. p. 101-117; and 20 Ch. D. p. 229-441.

WILL—ACKNOWLEDGMENT OF SIGNATURE.

The first of these comprises a single case, viz., *Blake* v. *Blake*. In this case it appeared from the evidence of the two witnesses to a certain will, that they neither of them could see the signature of the testatrix, a piece of blotting-paper being placed over the last sheet of the will, terminating below where the testatrix signature was afterwards found to be. The Court of Appeal held unanimously, though with much regret, (affirming the President), that this was no will. The opinions of the Judges turn on the point that the witnesses did not see the signature of the testatrix. Jessel, M. R., says:—"I think it is clear that this will was not signed in the presence of either witnesses . . . The question then arises whether the testatrix acknowledged her signature before the witnesses. What is in law a sufficient acknowledgment under the statute? What I take to be the law is correctly laid down in Jarman on Wills, fourth edition, p. 108, in the following terms:—'There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will;' and I may add, in my opinion, it is not sufficient even if

the testator were to say:—'My signature is inside the paper,' unless the witnesses were able to see the signature." He then proceeds to discuss the cases on the point. Brett, L. J., says:—"It has been brought to this, where the witnesses cannot see, have no opportunity of seeing, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there, and they see or have the opportunity of seeing it, then if the testator says, this is my will, or words to that effect, that is sufficient acknowledgment, although he does not say this is my signature."

DICTUM—OVERRULING PRIOR DECISIONS.

In this judgment of Brett, L.J., moreover, he says:—"It is a point which must be decided upon the statute itself, and even if twenty cases decided that it would be a sufficient acknowledgment, if we were clearly of opinion that according to the true construction of the statute it would not do, we should not be bound by those cases. Where there have been several decisions, or a series of decisions, upon any statute, I should dread to overrule those decisions or that series of decisions, but still we should be compelled so to do if we thought that those decisions were not in accordance with the statute. But in this case we have no long line of decisions one way; there seem to be conflicting decisions, and we must according exercise our own judgment on the question independently, almost, if not quite, of every former decision."

Proceeding now to the July number of the Chy. D., the first case requiring notice is *In re Baker, Collins* v. *Rhodes*, p. 230, the substance of which may be briefly stated thus:—

EXECUTORS—DEVASTAVIT—LACHES.

Mrs. Seaman died in 1869, and at that time her son-in-law was a specialty creditor upon her estate for £500, and had been since March 14, 1860. One Wish was her sole acting executor, and he, though aware of the existence of the debt, instead of providing out of her estate funds to meet the liability on this specialty, left her estate, consisting entirely of shares in a bank which *had since failed*, unconverted. Now, in 1879, *i. e.* after a lapse of more than 18 years, the son-in-law's executors strove to recover from Wish the amount of the debt. The Court of Appeal held they had a right to do so Jessel, M.R., says:—"The Judge, in treating the mere nonsuing by a specialty creditor for a period of 18 years to be such negligence as to disentitle him to succeed in his claim now, came to a wrong decision." And Lush, L.J., to the same effect, says:—"It is new to me that a specialty creditor who takes no steps to recover his specialty debt for 18 years can be held guilty of negligence so as to lose his right to payment when he is allowed by the statute 20 years within which to recover his debt."

POWER TO LEASE—TENANT TO DO "NECESSARY REPAIRS."

The next case, *Fowler* v. *Barstow*, is on a point of practice, and will be found noted among the recent English Practice Cases, *supra* p. 136. In the next case, *Truscott* v. *Diamond Rock Boring Co.*, p. 251, the point was this:—A settlement of house property gave power to the trustees to demise or agree to demise all or any of the messuages "to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or sums of money in improvement thereof respectively as shall be thought adequate for the interests therein respectively." The trustees agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs," and the question was whether the agreement satisfied the terms of the power. The Court of Appeal unanimously held that it did. Jessel, M.R., says:—"The word 'necessary' is not material, for it only expresses that repairs are required. If repairs are wanted at all they are necessary, and if they are not wanted a tenant under an agreement to repair would not be bound to do anything; the agreement, therefore, is in substance simply an agreement that the tenant

shall repair. The case is, therefore, within the words of the power. Is it within the substance? I am of opinion that it is. It imposes on the tenant the burden of doing all repairs which are required, and that includes all the repairs which, but for the agreement, the landlord would be obliged to do. I think this is what the power intended. It has been urged that it was the intention of the power that the lessee should put the property in repair at the commencement of his tenancy. That is satisfied by an agreement to do repairs, for such an agreement means that the tenant shall do all repairs which are requisite during the continuance of his tenancy, and includes putting the property in repair. The agreement, therefore, satisfies the requisitions of the power in substance as well as in form." Brett, L.J., says:—"I cannot agree that 'improve' and 'repair' are equivalent terms, and that the power, when it speaks both of repairing and improving, means that the lessee would in every case be bound to improve the property. Taking the words in their natural sense they mean that the landlord is to be freed from doing the repairs which a landlord usually would have to do. Usually a landlord gives the premises to the tenant in good repair, and if there are no special stipulations the tenant is bound to do some repairs, the others must be done by the landlord if done at all . . . Would a lease, to be drawn up according to the terms of this agreement, contain such a covenant as the power requires? The lessee is to do 'necessary repairs.' Mr. Justice Chitty seems to have thought that this only applied to a very limited class of repairs, but I think it must mean all such repairs as would be necessary to enable the landlord to hand over the property to a new tenant in substantial and tenantable repair. Therefore I think that the terms of the agreement satisfy the requirements of the power."

COMPANY—WINDING UP—PRACTICE—COSTS.

The next case requiring notice is *re General Financial Bank*, p. 276, on account of the point of practice, and of the decision as to costs in reference to the winding up of companies contained therein. The point as to practice relates to the appointment of official liquidators, (cf. R. S. O. c. 5, s. 8, subs. 3,) and is shown by the following passage of the M. R.'s judgment:—"I have indicated for years past that the practice was settled that the Court ought not to make an order on the hearing of a winding up petition for the appointment of an official liquidator, but that this should be done in Chambers . . . I thought this was the settled practice, and I wish to lay down for the future that it ought to be so, and that it is the opinion of the Judges of the Court of Appeal, which every Judge of first instance ought to follow." The point as to costs is given clearly and sufficiently in the words of the head-note thus:—A creditor who presents a petition for winding up in ignorance of a prior petition, is entitled to his costs up to the time when he has notice of the prior petition, but if he then proceeds he will not be allowed his further costs, unless he has good reason to suppose that the other petition is not *bona fide*, in which case he is justified in proceeding and may be allowed his costs.

Proceeding now to *ex parte Reynolds*, p. 294, that case is found, in the language of the M. R., to comprise a question of general importance, viz., "Whether, when a witness objects to answer a question put to him on the ground that the answer to it may tend to criminate him, the mere statement of his own belief that it will tend to criminate him is sufficient to excuse him from answering; or whether the Judge is entitled to decide, not merely accepting the witness' statement, whether the proposed question has really a tendency to criminate him, or may fairly be considered, under all the circumstances of the case, as having that tendency. The Court of Appeal now upheld Bacon, C. J., in deciding in favour of the latter alternative. The M.R., who delivered the principal judgment, declares the law to be correctly stated in *Reg.* v.

Boyes, 1 B. and S. 311, where Lord Cockburn, L.C.J., says :—"To entitle a party called as a witness to the privilege of silence the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We, indeed, quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. . . Subject to this reservation a Judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril."

The next case, *Turner* v. *Hancock*, p. 303, has already been noted among recent English Practice Cases, *(supra* p. 342,) so far as it is a decision that the costs of a trustee are an appealable matter notwistanding the Judicature Act; but there is a *dictum* of the M. R., at p. 305, which may be noticed here.

COSTS OF TRUSTEES—TENDENCY OF MODERN DECISIONS.

He says :—"It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons who might undertake them for the sake of getting something by them."

RAILWAY COMPANY—ACCOMMODATION WORKS.

Wilkinson v. *Hull Ry. Co.*, p. 323, it does not seem necessary to dwell upon. It decides that land required by a railway company for accommodation works, are lands required for the purposes of "the undertaking" or "of the railway," within the meaning of the *Imp. Railways' Clauses Consolidation Act.* It also decides that every work which a railway company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking. But our General Railway Act, R. S. O. c. 165, does not appear to contain similar words, and in sect. 9, subs. 2, it empowers railway companies to take of any corporation or person any land "necessary for the construction, maintenance, *accommodation*, and use of the railway;" and the wording of the Dominion Consolidated Railway Act, 1879, (sect. 7, subs. 2,) is similar. So also it seems unnecessary to notice at any length the case of *re Great Britain Mutual Life Ass. Society*, p. 351. In that case, on a petition being presented for the winding up of a life insurance company, an order had been made directing a scheme to be prepared for the reduction of the contracts of the company. This order was made under Imp. Life Assurance Companies Act, s. 22, the theory of which enactment is, that if the company is insolvent the Court may reduce the contracts instead of making a winding up order; and the question was at what time the contracts to be included in the scheme for reduction were to be ascertained. But our Act respecting the winding up of Joint Stock Companies, 41 Vict. c. 5, does not appear to contain any similar enactment.

FRAUDULENT DEED—13 ELIZ. C. 5.

At p. 389, however, is a case, *re Johnson, Golden* v. *Gillam*, which seems to call for more particular mention. In this case, by a deed of gift, J. granted farming property in trust for her daughters, in consideration of which they covenanted to pay the debt "incurred by J. up to the date of the deed in connection with the working and management of the said farm," and to maintain J. J. had no other property than that comprised in this deed, and the plaintiff's debt not having been incurred by J. in connection with the farm, was defeated by the deed. The question was whether the deed was or was not valid under 13 Eliz. c. 5. Fry, J., held that it was valid, for that the circumstances showed that the

intention of the parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and in consideration of that to take immediately that farm which, in all probability, they would otherwise have received by will upon their mother's death. He cites with approval the language of Kindersley, V.C., in *Thompson* v. *Walker*, 4 Drew 628, where he says:—"The principle now established is this, the language of the Act being that any conveyance of property is void against creditors if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder or delay his creditors." Later on he meets three objections to the validity of the deed which it seems well to notice, (i.) he says:—"It is said, and said truly, that a person must generally be taken to intend the result of his acts. That is often, but by no means always true, because, although no doubt the immediate and main result of our acts must be the object of our intention, there are many collateral results of acts which are not only not objects of our intention, but against our wish. There are many unintentional results of unintentional acts." (ii.) He says:—"It is said that with respect to many creditors who are included in the covenant, they are defeated and delayed, because before the execution of the deed they had a right against the property, and after the execution of the deed they would only have a right to the enforcement of the covenant. But that is the result of almost any dealing. If I am indebted and sell my estate, my creditors lose their right of proceeding against the estate, and can only proceed against the purchase money." (iii.) He says:—"It appears plain that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a *bona fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case."

WILL—CROSS EXECUTORY LIMITATION—IMPLICATION.

In re Hudson, p. 406, is an important case inasmuch as Kay, J., there deduces from the authorities and tabulates the rules which govern the implication of cross executory limitations in wills. In the will in question there was a cross-limitation upon failure of any *stirpes* to the other *stirpes*, but the cross-limitations between the individuals of the same *stirps* were not complete so as to cover every possible event; and in the event which had actually happened there would have been an intestacy as to part of the estate, if the Court had refused to fill up the gap by implying a cross-limitation as required. Kay, J., held that the cross-limitation might be implied, and after reviewing the authorities he deduces from them the following rules:—

(i.) Cross executory limitations in the case of personal estate, like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seem from the context to have been unintentional.

(ii.) They cannot be implied—as of course cross-remainders could not—to divest an interest given by the will.

(iii.) The existence of other cross-limitations between different persons does not prevent the implication.

(iv.) But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention."

He then gives various instances in which such a gap in the limitation occurs, viz.:—

(a) Where there is a gift to several named

persons for their respective lives as tenants in common, and a gift over after the death of the survivor.

(b) Where, in a similar gift, there are limitations over of the shares of the tenants for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all.

(c) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gaps which would occasion an intestacy as to part of the estate.

RAILYWAYS—SUPERFLUOUS LANDS.

The two remaining cases in this number do not require special notice here; one is a decision under the Bankruptcy Act, and the other, *Hobbs* v. *Midland Ry. Co.*, p. 418, is concerned with certain enactments relating to the superfluous lands of railways which do not appear included in our railway Acts. The effect of the decision is to show that the mere fact of a railway company purporting to convey away lands acquired by them for the purpose of their undertaking, is not conclusive to show that the lands so conveyed are superfluous lands within the meaning of sect. 128 of the Imp. Land Clauses Consolidation Act, 1845.

REPORTS

RECENT ENGLISH PRACTICE CASES.

LYELL V. KENNEDY.

Imp. O. 19, r. 15—Ont. Rule 144.
Discovery under Judicature Act.

[Feb. 15, C. A.—L. R. 20 Ch. D. 484.

Per JESSEL, M.R.—This is simply an action to recover land and mesne profits by a legal title, and then the question comes to this: could there have been a bill of discovery filed in aid of such an action if it had been brought before the Judicature Act? The answer to that is to be found in the judgment of the Court of Exchequer, in the case of *Horton* v. *Bott*, 2 H. & N. 249 [where it is held not to exist]. . . We have now to proceed under the Judicature Act, which makes no distinction between equitable and legal actions. Still, this being an action for the recovery of land by a legal right, is exactly the old action of ejectment in substance though not in form. The Judicature Act makes an alteration of procedure merely, and not an alteration of the law, and if there was no right to file a bill of discovery or to administer interrogatories before the passing of the Judicature Acts, there is no such right now.

Per BRETT, L. J.—If neither by the Common Law Procedure Act nor by the Rules in Equity could a plaintiff in an action of ejectment before the Judicature Act have obtained by means of interrogatories any discovery for the defendant in order to support his own title, he cannot do so now. The judges, in framing the rules under the Judicature Act, took particular pains, as is manifest from Imp. O. 19, r. 15 (Ont. r. 144) to maintain the rights of persons in possession of land in this country to stand possessed of it until persons who claim to dispossess them prove their own title entirely by their own means. That is a question of high policy with regard to the possession of property in England, from which it never was intended that the Judicature Act should in any way derogate.

HOLKER, J., concurred.

[NOTE.—*The Imp. and Ont. rules are identical. R. S. O. c. 50, s. 156, and G. O. (Ch.) 138 gives the right to examine parties before trial, and the remarks of the M. R. would seem to apply to our Judicature Act as much as to the English.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[Sept. 9.

MILLS V. KERR.

Assignment for benefit of creditors—Partnership creditors—Separate creditors.

The judgment of the Court below (32 C.P. 68) holding that an assignment for the benefit of partnership creditors only was void, as being a

preference of partnership creditors over separate creditors, affirmed on appeal.

S. H. Blake, Q.C., for appeal.

Rose, Q.C., contra.

BAILLIE v. DICKSON.

Promissory note—Notice of dishonour—Renewal—Principal and agent.

The note upon which this action was instituted had not been properly stamped, and it was urged that it could not be a payment or satisfaction of one of which it was intended to be a renewal.

Held, that the plaintiff being aware of the objection to the unstamped note, and receiving it in lieu of the paper which he held, could not urge this as an objection, he having declared upon it as a promissory note.

Where the holder of a note employs a notary to protest the same at maturity, it is his duty to give the notary all the information that he is possessed of as to the names and residences of the endorsers. Therefore, where the signature of an endorser was so peculiar that no one unacquainted with it could decypher it, and the notary when protesting it made, as near as may be, a *fac simile* of the signature, and so addressed the notice of dishonour to "Belleville, P. O.,"—meaning, as he said in the evidence, "Province of Ontario,"—and the notice never reached the endorser.

Held, that the endorser was released.

Bethune, Q.C., for appeal.

Geo. Kerr, contra.

IN RE RUSSELL, AN INSOLVENT.

Insolvency—Discharge of insolvent—Concealment of assets.

A deed of composition and discharge was executed by creditors, and they had been paid the amount of composition. The insolvent, however, had not executed such deed, so that it was incapable of confirmation.

Held (per BURTON, J. A.), that the insolvent might still move for his discharge under the Act of 1875.

A retention by an insolvent of portions of his estate, and the concealment thereof by him must, to come within section 56 of that act, be wilful and fraudulent.

BEAVIS v. MCGUIRE.

Conveyance for value—Hindering or delaying creditors—13 Elizabeth, c. 5.

The defendant M. created several mortgages on his property, in each of which his wife joined to bar her dower upon the promise of M. that he would convey other property to her. Finally M. sold the equity of redemption, when the wife claimed the conveyance of the other land, which M. then conveyed to a trustee for her benefit.

Held, (affirming the decision of PROUDFOOT, J.), that such conveyance in trust was not voluntary, although the effect of it was to delay creditors in recovering their debts; and it having been shown to be a *bona fide* transaction, it could not be impeached under 13 Eliz. c. 5.

Moss, Q.C., and *Beck* for appeal.

S. H. Blake, Q.C., contra.

ADAMSON v. ADAMSON

Grant, Construction of—Statute of Limitations.

Two several lots were conveyed to G. and A. respectively, to the use of G. and A., their heirs and assigns, as joint tenants and not as tenants in common.

Held, that the grantees took the respective lots in severalty.

Held also (affirming the judgment of SPRAGGE, C., 28 Gr. 221), upon the facts there stated, that the tenant of an equitable tenant for life, in setting up the Statute of Limitations against the equitable remainderman, could not be allowed to compute the time during which he had been in possession prior to the death of the tenant for life.

Per BURTON, J. A.—The owner of an equitable estate cannot, notwithstanding the Judicature Act, proceed against a trespasser in his own name. He is still bound to sue in the name of his trustee.

The provisions of the Statute of Limitations as regards equitable estates considered.

Per PATTERSON, J. A.—Under the circumstances appearing in this case the plaintiff was entitled to recover in respect of the equitable estate.

Bethune, Q.C., and *Moss*, Q.C., for appeal.

Mowat, Q.C., and *Maclennan*, Q.C., contra.

NELLES v. BANK OF MONTREAL.

Insolvency—Unjust preference.

The decree of BLAKE, V. C., 28 Gr. 449, affirmed on appeal.

Rose, Q.C., and *McDonald*, for appeal.

Street, contra.

THE QUEEN EX REL. GRANT v. COLEMAN.

Quo warranto—Municipal elections—Appeal.

The Judge of the County Court ordered a writ of *quo warranto* to test the validity of the election of an alderman; and subsequently, before appearance entered to the writ, set aside all proceedings in the matter for irregularity. The relator thereupon applied in Chambers for a *mandamus* to compel the County Judge to try the case, when the presiding Judge (HAGARTY, C. J.) refused the writ; and on motion in *banc* the Court affirmed his ruling (see 8 P. R. 497, 46 U. C. R. 175). Whereupon the relator appealed to this Court, which appeal was dismissed, on the ground that the Judge in Chambers had not power to review the order of the County Judge if he had authority to make it; and if it could be reviewed the application should have been to the Court, not to a Judge in Chambers as here; and under all the circumstances the appeal was dismissed without costs.

The writ of *quo warranto* having been issued and served, the County Court Judge had not power to set it aside.

McMichael, Q.C., for the appeal.

Aylesworth, contra.

NEILL v. THE TRAVELERS INS. CO.

Accident policy—Voluntary exposure to risk.

An appeal from the Court of Common Pleas, who ordered a non-suit after verdict for the plaintiff (31 C. P. 394). The Court being equally divided, the appeal was dismissed with costs.

Per HAGARTY, C. J., and CAMERON, J.—The evidence shewed that the deceased had voluntarily gone unnecessarily into a place of danger.

Per BURTON and PATTERSON, JJ.A.—In an action upon an accident policy, the company were bound to show a breach of the conditions in the policy, and that the party insured had voluntarily exposed himself to unnecessary danger; that in a case where there was evidence of the insurance and death by accident, it was one proper for the jury, and if the evidence adduced by the defendants was not sufficient to prove the defence as raised on the pleadings, the verdict should have been for the plaintiff; and under the circumstances a new trial should have been directed.

One of the conditions of the policy was that the insured should not stand or walk on a railway track.

Per HAGARTY, C.J., and CAMERON, J.—Such condition was broken by the insured being on a railway tract in a buggy.

Per BURTON and PATTERSON, JJ.A.—Such condition was intended to apply to the case common in Canada of persons using the railway tracts as roadways, and could not be considered as applying in every case of an accident to the insured while on such track.

S. H. Blake, Q.C., and *G. H. Watson* for appeal.

Robinson, Q.C., contra.

MACDONALD v. WORTHINGTON.

Partnership articles, Construction of—Ownership of stock—Law of Quebec—Reformation of articles.

The plaintiff and defendant M., having on hand large contracts to fulfil, enterted into partnership with the defendant W., under the style of J., W. & Co. The articles of agreement, which were drawn in the Province of Quebec, declared that the plant, which the plaintiff contributed to the partnership, should become the property of the said firm, that is to say, the one half thereof shall revert to and belong to the plaintiff and defendant M., and the other half to W. The law of Quebec was found to be that if nothing were provided by the articles as to ownership of the plant, it would be taken out of the partnership at the conclusion of the same by the party who had contributed it, before division of profits. The plaintiff and the defendants M. all swore that the intention was that they should receive credit for the plant as their property in the accounts of the partnership. It was shown also that in the treaty for the partnership, inventories of the plant were drawn and its value was discussed, the plaintiff putting it at $57,130, W. at $40,000. The notary who drew the articles swore that if it had been intended to make a

transfer of the property in the plant, he would have expressed such intent more explicitly. The book-keeper swore that the plaintiff had claimed credit in the books for the plant from the first; teat in discussing the matter with W. a reason had been suggested for not immediately giving such credit thar the plant was under mortgage.

Held, that upon a true construction of the articles of partnership as drawn, the plant was withdrawn from the operation of the law of Quebec as proved by its ownership being expressly provided for by the instrument; but that the evidence given by the parties other than W. was clear and satisfactory; that a mistake had been made in drawing the same, and that the articles should be reformed so as to entitle the plaintiff to credit for the plant in taking the accounts; and on this ground the judgment of the Court below was reversed.

McCarthy, Q.C., for the appellant.

Bethune, Q.C., for defendant in same interest.

S. H. Blake, Q.C., and *W. Cassels*, for the respondent.

IN RE HILL.

Insolvent Act of 1875—Application for discharge—Non-disclosure of cause of insolvency—Defective books.

The insolvent, nine months before his insolvency, stated to the contestant that he had a surplus of $40,000. When he failed it appeared that there was a deficiency of nearly that amount, the difference not being satisfactorily accounted for. He did not produce all his books, but it was shown that they were kept in such a manner that the true state of his affairs could not have been ascertained therefrom. The cash book was never balanced, no balance sheet was made out, bills were discounted which did not appear in any of the books, and goods were transferred from one establishment to the other (the insolvent having a wholesale and retail place of business) without entry.

Held [reversing the order of the Judge below, granting a discharge to the insolvent], (i) that, though an insolvent is guilty of the offence of not fully, clearly and truly stating the cause of his insolvency, that is no ground for refusing the discharge, even after the conviction for the offence; (ii) the omission to keep any books prevents the Judge from granting a discharge, whether the intent was fraudulent or not; but (iii) when they have been kept, it is not essential on the one hand that they should be kept in the most approved form, nor are they sufficient on the othe hand, however carefully kept in some respects, if they fail to exhibit the insolvent's true position; (iv) that the evidence in the case disentitled the insolvent to his discharge.

Liberty to apply was given on the insolvent's producing the remainder of his books.

CHANCERY DIVISION.

BOYD, C.] [Oct. 25.

RE DEFOE.

Trustee and cestui que trust—Statute of limitations—R. S. O., c. 108, s. 5, subs. 8.

Petition under Quieting Titles Act.

Petitioner was let into possession of the land in question by his father, in 1870, in such circumstances as in law constituted him tenant at will to his father, and so continued till 1878, when his father died, leaving a will, by which this property was devised to trustees—"upon trust to demise and lease or otherwise manage and employ the land in such manner as they should deem best, and to pay the rents, issues, and profits to the petitioner for his life, and thereafter to sell the land and invest the proceeds for the benefit of the son's widow and children. This devise was made known to the son after the father's death, but he did not by word or act refuse to take the beneficial life estate devised to him. He continued in possession ostensibly as before, and now claimed that the Statute of Limitations had perfected his title to the lands as against the beneficiaries under the will.

Held, (reversing the decision of the Referee of Titles at Stratford) that after the testator's death, the statute ceased to run in favour of the petitioner's possessory claim, inasmuch as his possession thereafter was that of *cestui que trust* rightfully there by virtue of his equitable life estate under the will.

For (i) on the view of the facts most favourable to the petitioner, he neither accepted nor declined the life devise, but remained passive—and this being so, the presumption that he accepted must prevail, inasmuch as the devise for

life was *prima facie* a beneficial one, giving him, as it did, for his life absolutely, that to which otherwise he had acquired no title. And (ii) the fact of the legal estate being devised to trustees for the use of the petitioner for life, did not materially affect the result,—inasmuch as (*a*) even if it could be rightly considered that on the death of the testator a new tenancy at will as between the trustees and the petitioner was created by implication, nevertheless an additional period of ten years would have to run before the fresh right of entry thus accruing would be barred; but (*b*) sect. 5, subs. 8 of R. S. O. 108, declares that no *cestui que trust* shall be deemed a tenant at will to his trustee in the meaning of the next preceding subsection, and this being so, there is no *terminus a quo* for the period of limitation, and such a case is not covered by the statute.

Gerrard v. *Tuck*, 8 C. B. 231 followed.

J. Fleming, for the appellant.

J. Iaington, for the respondent.

BOYD, C.] [Oct. 25.

TRINITY COLLEGE v. HILL.

Opening foreclosure—Innocent purchaser.

When there has been a final order of foreclosure of property mortgaged—although, while yet the mortgagee retains the property, it is not impossible to have the foreclosure opened in circumstances when it would involve great hardship to refuse relief, and the delay is satisfactorily accounted for—yet no case has gone beyond that, and it is a salutary rule to adopt in this country, where land is regarded as an article of commerce, that the claim of the mortgagee to the equitable interference of the Court is forfeited, if before his application the rights of purchasers intervene.

Views expressed by Van Koughnet, C. in *Platt* v. *Ashbridge*, 12 Gr. 107, preferred to the dicta of the M. R. in *Campbell* v. *Holyland*, L. R. 7 Ch. D. 173.

Van Koughnet, for the College.

Bain, for the petitioner.

Hoyles, for the purchaser.

BOYD, C.] [Oct. 25.

YOUNG v. ROBERTSON.

Specific performances—Demurrer for misjoinder of parties—Judicature Act.

Where a demurrer is raised to a statement of claim in an action for specific performance, on the ground that there is no agreement shewn between the parties, whereupon the defendant is made liable to the plaintiff, it is enough if in any aspect of the case the plaintiff may be entitled to some relief.

In the present case the owners of the property contracted to be sold were married women, but they joined their husbands as co-plaintiffs in the action for specific performance of the contract, and a demurrer being raised *ore tenus* on the ground that the suit was wrongly constituted,

Held, inasmuch as the ground of the objection rested on the doctrine of misjoinder of parties, which is not now a ground of demurrer under the practice established by the Judicature Act, an amendment of the record as to parties might be allowed; and it was allowed accordingly on payment of a $5 costs.

Werderman v. *Societe Generale d' Electricite*, L. R. 19 Ch. D. 250 followed.

W. Cassels, for the demurrer.

W. Nesbitt, contra.

[NOTE.—*Werderman Societe* v. *Generale d'Electricite*, is noted in this Journal, *supra*, p. 18.—EDS. L. J.]

Boyd, C.] [Oct. 25.

RE O'BRIEN.

Foreign administration—Private international law—Removal of proceedings from Surrogate Court to this Court—Peremptory writ.

One B. dying domiciled in Portland, Maine U.S.A., R., a creditor of her estate, obtained letters of administration there. Subsequently, S., as appointee of R., and with his consent, applied here for letters of administration to be granted to him by the Surrogate Court here. E., however, residing at Toronto, and as next of kin to B., also applied here for letters of administration to B.'s estate. B. was at the time of her death entitled to certain monies now in this Court. S. now applied to have the matter transferred from the Surrogate Court into this Court, or for a writ of prohibition to the judge of the Surrogate Court preventing him granting

letters to E., and a mandamus, ordering him to grant letters to S.

Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the Court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the Court in Maine, the *status* of the creditor or of his appointee who obtained administration there, was not such as to compel the Surrogate judge here to pass over the next of kin.

The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge who appoints, and that cannot be interfered with by any peremptory writ, such as asked for in this case. *Browne* v. *Phillip*, noted Ambl. 416, followed. *Re Hill*, L.R. 2 P and D. 90, distinguished.

Held also, the above facts did not show such a case of conflict as would justify removing the matter of contention from the Surrogate Court into this Court.

D. A. O'Sullivan, for the application.

J. A. Donovan, contra.

LAW STUDENTS' DEPARTMENT

MICHAELMAS EXAMINATIONS.

The following are the dates of the forthcoming Michaelmas Examinations:

Primary—Tuesday, Nov. 7th.

Graduates and Matriculants present themselves on Thursday, Nov. 9th, at 10 a.m.

First Intermediate—Tuesday, Nov. 14th.

Second Intermediate—Thursday, Nov. 16th.

Solicitor—Tuesday, Nov. 14th.

Barrister—Thursday, Nov. 16th.

Every candidate for Call or Certificate of Fitness, who shall have omitted to file all his papers and pay his fees, on or before Nov. 4th next, will be required to present a special petition and pay a fee of $2.00.

CORRESPONDENCE.

Married Women's Act.

To the Editor of the LAW JOURNAL.

Can a married women, living with her husband and not carrying on any separate business from her husband, but having separate estate and married since 4th May, 1859, contract with reference to her separate estate? The courts have held that when she makes a contract, not as agent of her husband, she contracts in reference to the separate estate, if she have any, and that she is liable. I have not seen the point raised as to *coverture* in connection with the Married Women's Property Act in any case before the courts, and until such point is raised I am of opinion that a married women being, in consideration of law under the coercion and dominion of her husband, and consequently having no legal capacity to assent to a contract, either respecting his property or her own, can not contract because she has no separate existence: see *Marshall* v. *Rutton*, 8 T. R. 545; *Lewis* v. *Lee*, 3 B. & C. (291)

R. S. Ont. c. 12, has not made any provision to remove any disability—and coverture is a disability,—and so long as any one is under a disability they have no power to contract. Sec. 20, c. 125 R. S. Ont., only provides, as I understand it, for any debt or contract arising out of her separate business or her separate estate, or for any debt which she may have contracted before coverture; but not to any private debt which the wife may contract, nor as the agent of the husband, or in reference to his separate estate. Having doubt on this question I would like to hear the opinion of some other student, or some gentlemen learned in the law, on the subject.

LEX.

Pembroke, Oct., 1882.

British Columbia Legal News.

To the Editor of the LAW JOURNAL.

SIR,—It is a subject of surprise and regret to some of your readers in British Columbia that you obtain so much inaccurate information respecting the administration of Justice in that province, particularly as the information is generally understood at Victoria to emanate from a very high source.

CORRESPONDENCE.

Ex. gr. At p. 224 "One of your Readers" states that "We, as a Bar, almost without exception, concur in the main point of the judgment" on the constitutional questions in the *Thrasher Case*. The fact is the reverse, as your correspondent must have known if he had really been, as his letter implies, a practitioner. Then, towards the close of his communication, he says that this constitutional judgment is now, he hears, under appeal; whereas the fact is that no such appeal has been attempted—perhaps because neither party had any interest in prosecuting it, perhaps because no appeal lies.

I observe that you now announce, (p. 314), "on what (you) consider good authority, that some of the chief and more influential Q.C.s in England, after studying with care the judgment . . have given their opinion that the B. C. judges have satisfactorily made out that the Supreme Court of British Columbia is a Dominion and not a Provincial Court within the B. N. A. Act 1867, s. 92, par. 14." Assuming that you have not been misinformed upon this point, as you certainly have been upon several others, I respectfully submit that the announcement is worthless unless you give the names of the learned counsel and their opinions in full.

In the interests of truth and justice you will, I am confident, give the same publicity to this communication as to those to which it refers.

VERAX.

Victoria, Oct. 7th, 1882.

[WE have not the slightest hesitation in publishing the above. Our correspondent will, however, oblige by giving "particulars" under the first count of his indictment. Those that he gives are not sufficient to maintain it. As to the first point, we are glad, if the writer of the letter referred to by our correspondent was mistaken, to have the mistake corrected. As to the second, we did not speak of our own knowledge, but simply related an *on dit*. It is quite possible that opinions have been given both ways. However, as the "announcement is worthless," there is, of course, an end of the matter. The best thing our correspondent can do is to send us a letter occasionally on British Columbia legal news. We are anxious to give all the information we can, and will find space for any well considered suggestions or temperately expressed sentiments.—EDS. L. J.]

Unlicensed Conveyancers.

To the Editor of the LAW JOURNAL.

SIR.—It may seem to you and to some of your readers that this question is almost exhausted? But I am of opinion that it is only by continuous and persistent agitation that country lawyers will ever obtain justice. In the village where I am trying to make a living there is one other practising barrister and four so-called conveyancers. The charge we make for drawing a deed and searching title is $3.00 in ordinary cases—not a very extravagant rate, you will say, when compared with city offices. Our adversaries will undertake the work for $1.00, and tell the unfortunates who patronize them that there is no need in any case to investigate the title. The result is that while regular practitioners are straining to keep body and soul together, these sharks get all the work, which makes a very nice addition to land surveying, insurance, Division Court clerkship, etc. Where is the justice in making us pay exhorbitant fees, hedging us in by inexorable rules of professional etiquette, and when our hands are thus tied allowing these men to rob our children of their food.

You are probably aware, Sir, that shortly before the last election for Benchers a circular, addressed particularly to the country members of the professton, was sent out asking for opinions on this question, and stating that it was the intention of the Benchers to move in the matter. But what did they do? No sooner were they elected than it was moved in the next term that it was very inexpedient to do anything in the premises. Inexpedient for whom? Toronto men and cowards who sit in the House of Legislature. What was that circular but a bribe to catch the vote of the long-suffering country lawyer; unworthy of the authors of it when not followed by something like an attempt to carry out its proposals. The Benchers are not alone to blame, the cowardice of the Government stands as much in the way as the inaction of our representatives.

I for one will not sit quietly under the wrong. This is the last year in which I shall pay fees to a society from which I derive no benefit. After that I shall make all the money I can by every means available. If I must compete against men protected by the law and the Law Society, I want a fair field and no favour—let me cut the cords that tie me hand and foot.

Is the Law Society a farce or a reality? I spent four years in the University and three in the Law Society School, besides a large sum paid in fees—for what? to be placed on a lower footing financially than men who cannot tell the meaning of a Short Form of Conveyance, but can manage to stop the holes left by the printer.

If I advertise my business the Benchers soon see that I am brought back to gentility and starvation. If I attempt to add to my limited income by any other business off comes my gown.

It is not only conveyancing that these men do, but a general practice, using their clients names they prepare Surrogate papers, give advice, and make collections under terror of a flaming heading such as "Notary Public and Commissioner in B. R., etc.," or "Official Assignee and Justice of the Peace," and several other Government-bestowed titles.

How is it that this is the only country under Heaven where such a state of things exists? If you call it freedom, make the freedom a little more general; take away the restraints, abolish the fees and the fence. If we have bought a legal education and must compete with men who have none and no restraints, let us fight with our hands free. Take either horn of the dilemma, I care not which, but let the present anomaly end. This question is a vital one to the public, whose interests are identical with the profession's, as I could easily prove did space permit. But I will conclude, thanking you for your space and past earnest advocacy of our cause.

I am yours,

A SUFFERER.

[As we have said before, the reasons why an attorney or solicitor in the country should take out his certificates are very few in these days, and practitioners in the country are beginning to find this out, and thus it may become a more serious question for the Law Society than it at present supposes. At the same time we fully recognize the peculiarities of the situation which render it extremely difficult for the Benchers to apply any remedy. The obstacle is the silly prejudice in the popular mind against the profession, which is magnified and utilized by certain members of the Local Legislature for their own selfish purposes, and the leaders of both sides seem weak enough to be swayed by the incorrect representations and clamour of interested men who happen to have for the time political influence. We had hoped that one occupying the high position of the present Attorney-General, who we believe is honestly endeavouring to do what he thinks right, and who is backed by such an overwhelming majority, would have taken a firm stand in this matter, and aid those who are being pillaged by an invading army. We cannot but think that a full representation to him, if not already made, would induce him to see that right is done in the premises.—EDS. L.J.]

Division Courts—Judgment debtor—Means and ability to pay debt.

To the Editor of the LAW JOURNAL.

SIR,—I had a judgment debtor up before the Judge for examination. The debtor upon his examination admitted he was under no expense whatever; that his wife, who owned the place, provided him with everything he needed; that he worked at home when he pleased, but did not work out; that he had no means of any kind: his wife lives, as does the debtor, on the wife's farm. Would the Judge be justified in making an order for a monthly payment under such circumstances? The Judge declined as debtor had no visible means to pay? If not how can a man who owes a debt be made to pay it? A man who can work and wont, I think ought to be made, so he may pay his debts. An answer will oblige.

CREDITOR.

THE question put by our correspondent is an interesting one, and at first sight might seem not to come within the wording of the Statute. But a full consideration of the spirit of the enactments for the protection of creditors, under section 182 of the Division Courts Act, leads us to the conclusion that it was probably intended to be covered by that provision. The facts are not fully stated, and it is quite possible that the debtor might come within sec. 4 (*a*). But however that may be, we are inclined to agree with the learned Judge of the county of Simcoe, who, under circumstances similar to those above stated, has more than once committed judgment debtors who were able but not willing to work. He took the ground that the health and strength which the Creator has given a man are means and ability which he ought to employ to-

wards the payment of his debts, and if he fail to use these gifts he came within the provision of the Statute, and therefore liable to commitment on default. This was, perhaps, a "free translation" of the Statute, but a very sensible and righteous one, and there will be few to quarrel with it. There were, if we remember correctly, some other incidents in the cases referred to (coming under sub-sec. 3) which also influenced the learned Judge, but the view he expressed as to the words "means and ability to pay the debt" must meet with commendation, and we hope may sometimes be put in force for that unfortunate class of suitors known as "the poor creditor." We do not well see how a Judge's order in such a case could be disturbed, and the class of men mentioned by our correspondent ought to be reached in some way. If they are to escape altogether it should be known.—EDS. L. J.]

New County Court Tariff.

To the Editor of the LAW JOURNAL.

SIR,—A new tariff is badly needed for the County Court, as under the Judicature Act many proceedings have to be taken for which no allowance is made.

I understand that a new tariff was framed and submitted to the Judges for approval. Where is it now? Is it on or under the table?

ANXIOUS SOLICITOR.

Hamilton, Oct. 21st, 1882.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Processions in the streets.—*London L. J.*, Sep. 2.

Negligently signing negotiable note.—*Albany L. J.*, Sept. 2.

Duty toward infant trespassing on dangerous premises.—*Ib.*, Sep. 9.

Conveyance of easement by implication.—*Ib.*, Sep. 16, 23.

Covenant not to re-engage in business—Covenantee's discontinuance of business.—*Ib.*, Oct. 7.

Partnership—Implied power to bind the firm by negotiable paper.—*Central L. J.*, Oct. 20.

Witnesses criminating themselves.—*Justice of the Peace.*

Habeas Corpus—Custody of infant.—*Ib.*, Oct. 13.

Privilege of witness as to criminating questions. —*Continued—Irish L. J.*, Sep. 30.

Argument of counsel in criminal cases.—*Crim. Law. Mag.*

FLOTSAM AND JETSAM.

CHANGES ON THE BENCH IN QUEBEC.—The retirement of Mr. Justice Mackay has opened the way to an arrangement long anticipated, namely, the translation of Mr. Justice Doherty from Sherbrooke to the District of Montreal—the scene of his old trials and triumphs at the Bar. Judge Doherty was appointed to the bench in 1873, and during several years has had considerable experience in the St. Francis District. He is an energetic and conscientious judge, and will, we feel sure, enter upon the duties of his new position with a determination to discharge them faithfully. Mr. Brooks, Q.C., of Sherbrooke, succeeds to the vacany created in the St. Francis District.—*Legal News.*

In Germany a solicitor sent his bill of costs for business done. In the bill relating to a suit of divorce, he charged the lady one item, thus: "Further, 30 sous for being awoke in the night, and having thought over your matter.

Lord Chief Baron Pollock was one of the most dexterous imitators of handwriting, and used to amuse himself by sending letters in other people's names and handwriting, so correct that the person imitated would swear to its being his own work. Many practical jokes arose out of this little amusement.

Justice Maule was singularly dexterous in picking locks, and which he could not only open but close again, with no other appliance than a stout piece of wire. He had acquired the art by the frequent loss of his keys when at the bar. He used to tell the story how upon one occasion he astonished a country locksmith who had been called in and pronounced a portmanteau beyond his skill, and which the judge opened with ease.

Vice-Chancellor Wickens amused himself with binding books, at which trade he was an adept, and had all the elaborate tools and machines to expedite his work, and he turned out his volumes in masterly style.—*Curiosities of Law and Lawyers.*

LITTELL'S LIVING AGE.—This standard weekly magazine reached its *two thousandth* number with the issue of the week ending October 21st. The contents of the number are:—The Literary Restoration, 1790–1830, *Cornhill Magazine;* The Baroness Helena Von Saarfeld, *Macmillan;* A Venetian Medley, *Fraser;* "Fanaticism" in the East, *Spectator;* "Robin," by Mrs. Parr, author of "Dorothy Fox," etc.; Historical Cookery, *Fraser;* The Welcome of an Inn, *Saturday Review;* "Rachel," *Blackwood;* Moonstruck, *Sunday at Home,* etc. The issue of October 28 (No. 2001) contains:—Natural Selection and Natural Theology, *Contemporary Review;* George Eliot's Children, *Macmillan;* A Visit to Delphi, *Cornhill;* The Cure's Sister, *Argosy;* Lost Love, *Fraser;* Foreign Birds and English Poets, *Contemporary;* "Phiz" and "Boz," *Spectator;* "No New Thing," *Cornhill,* and choice poetry and miscellany.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year), the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1882.

During this term the following gentlemen were called to the Bar, namely :—

Messrs. John Donald Cameron and Charles Walker Oliver, with honors; and Messrs. John Campbell Ferrie Bown, Charles Joseph Leonard, Ernest Edward Kittson, Victor Alexander Robertson, Loftus Edwin Dancy. J. Hamilton Ingersoll, Henry Walter Hall, Robert Abercrombie Pringle, John Calvin Alguire, Frederick, Augustus Knapp, John A. Robinson and James Martin Ashton.

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Spencer Love Francis Robert Latchford, John Alfred McAndrew, Henry Walter Mickle, Alfred Mitchell Lafferty, Charles True Glass, Arthur Eugene O'Meara, Angus McMurchy, Edward George Graham, Robert Hall Pringle, Smith Curtis, Willoughby Staples Brewster, John Frederick Grierson, Edward Kirwan C. Martin John Shilton, Christopher Robinson Boulton, Fenwick Williams Creelman, William Hume Blake, Francis Wolferstan Goodhue Thomas, William Morris, Alexander Clive Morris, David Fasken, James Baird, Frederick C. Wade, Geo. Sandfield Macdonald, George Goldwin Smith Lindsay, Alfred Herman Gross.

Matriculants—Joseph Stockwell Walker, George Ira Cochrane, D'Arcy DeLessart Grierson, Edward James Barrow Duncan, Francis Hall, John Franklin Wills, Henry Parker Thomas. William Francis Johnston, Thomas Atkins Wardell, William Howard Hearst, Norman McDonald, W. J. Millican, John McKay, Robert C. LeVisconte.

Juniors—Herbert Alfred Percival, John Healy Reeves, James S. Chalk, John Henry Alfred Beattie, Wesley Byron Lawson, Henry Newbolt Roberts, Frank Foley Lemieux, James Percy Moore, James Herbert Sinclair, George Herbert Dawson, Neil McCrimmon, John Young Murdoch, Gordon Joseph Leggatt, George Henry Hutchison, George Luther Lennox, Richard Alexander Bayley, Edward Albert Crease, Joseph H. Jack, John Williams Bennett, Malcolm McLean, William George Burns.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad. B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
1882—The Deserted Village.
The Task, B. III.

Canada Law Journal.

VOL. XVIII. NOVEMBER 15, 1882. NO. 20.

DIARY FOR NOVEMBER.

15. Wed.. Final Examination for Attorney.
16. Thus.. Final Examination for Call. Wilson, J.Q.B., and Gwynne, J.C.P., 1868.
18. Sat... Hagarty, C.J., sworn in C.J. of Q.B., Wilson, J., sworn in C.J. of C.P., 1878.
19. Sun... *24th Sunday after Trinity.*
20. Mon.. Michaelmas sittings begin.
25. Sat... Lord Lorne Governor General of Canada, 1878.
26. Sun... *25th Sunday after Trinity.*
27. Mon.. Cameron, J., sworn in Q.B., 1878.
30. Thus.. Moss, J., appointed C J. of Appeal, 1877.

TORONTO, NOV. 15, 1882.

THE ceremony of the opening of the New Law Courts in London by Her Majesty, will take place in the third week in this month. The Queen will drive from Buckingham Palace, escorted by a squadron of Life Guards, and will be met by the Lord Chancellor at the grand entrance, where the opening ceremony will take place.

IN a recent matter before him, one of the Chancery judges took occasion to observe that legislation was much called for in the Trustee Relief Acts, animadverting on the difficulty practitioners often have in arriving at a correct conclusion as to the proper course to adopt in any given case, from the joint provisions of our own and the Imperial Acts.

WE are glad to know that Mr. Leith's edition of William's Real Property has been recommended by the legal education committee as that from which questions for the first intermediate examination should be taken, and the recommendation stands over for consideration till the second day of next term. Of the 13th English edition of this well known text book (1880) 107 pages are omitted in his work, as not only superfluous but calculated to mislead the student, since they relate to English law not in force here; and there are 24 other pages to which the same remark practically applies. Beyond this, in respect of statutes applicable here not in force in England, Mr. Leith has varied 32 pages of the English edition and added 42, and much abridged the texts as to the old law of descent. We have already called attention to the absurdity of students being required to learn things which they are shortly afterwards called upon to unlearn. They are much indebted to Mr. Leith for the assistance he has given them in their studies on an abstruse subject.

IT IS to be hoped for the sake of lawyers, as well as other business men, that our postal authorities will see their way and adopt the latest device of England's blind Postmaster General, who seems to see so much further into the business of his department than most of his predecessors. We allude to the Reply Post-card. This appears to be a perforated post-card, half being for the original message, half for the reply. On receiving such a card a reply may be written on the space allotted, which may then be torn off, directed, and put into the post. Thus the chance of the sender obtaining a reply, and a prompt one, is greatly increased, while the person to whom the card is sent is put to no postage expenses replying. Mr. Fawcett's postal money orders are also a great convenience. They differ from an ordinary post office order in this that they will be cashed on presentation at any post office in the kingdom. They are issued for all sorts of small sums, and will far less a tax to the applicant's patience

than is involved in the issue of post office orders. Again, while we write, news comes of another improvement. This is the placing of a box for late letters on the outside of the sorting carriage of mail trains. The public can now post their letters in these boxes, on payment of a small amount of extra postage.

It may be said, what has all this to do with law. We reply that it has nothing to do with law, but a great deal to do with lawyers. Even Uncle Sam must acknowledge that in postal matters, at any rate, there is "life in the old hoss yet."

RECENT ENGLISH DECISIONS.

The August number of the Law Reports, which have now been reached, comprise 9 Q. B. D., p. 137-336; 7 P. D., p. 117-126; 20 Ch. D., p. 441-561. In the first of these the first case arresting attention is *Hodgson* v. *Railway Passengers Ass. Co.*, p. 188, the former cases having apparently little, if any, application here.

STATUTE DIRECTING ARBITRATION—ONUS.

In this case an Act regulating an insurance company provided that any question arising under any policy should, if either the assured or the company required it, be referred to arbitration; it also provided that a judge might stay any action commenced by a policy-holder upon being satisfied that no sufficient reason exists why the matter cannot be, or ought not to be, referred to arbitration. Such an action having been commenced the company obtained an order staying proceedings. The plaintiff now appealed against this order to the Court of Appeal, which, however, held the *onus* of shewing that some sufficient reason existed why the dispute should not be referred to arbitration, and that he had not met this *onus*. Jessel, M.R., said:—"I have always acted on the simple rule that where a party applying cannot adduce a reason in support of his application, the judge may be satisfied that no reason exists. The plaintiffs here are in the position of a party applying, and if there is any reason why the matter should not be referred to arbitration it is their duty to bring it forward and present it to the judge, and if they cannot do so the judge is quite justified in being satisfied that there is no reason."

MARINE INSURANCE—MEASURE OF UNDERWRITERS LIABILITY

The next case, *Pitman* v. *Universal Ins. Co.*, p. 192, is expressed by Brett, L.J., to be of the "highest mercantile and legal importance;" while Jessel, M.R., observes that the precise question involved in it does not appear to have been decided, or even discussed in any case. This question the M.R. thus expresses:—"The question in this case is upon what principle ought the liability of underwriters to be determined when the ship has been damaged by the perils of the sea, and has been sold during the continuance of the risk without being repaired, in a case where the amount required to restore her to the same condition as she was in before the injury would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her?" The plaintiffs were the owners of a ship which had been sold under such circumstances, after some slight repairs, and which had been insured by the defendants. The judgment of Lindley, J., in the court below, gave the plaintiffs, who were suing on their policy, only the difference between the value of the ship in its uninjured state and the sum realized by its sale, after deducting from this latter sum the cost of the repairs which were in fact done. The plaintiffs now appealed, claiming to be entitled to recover the estimated cost of the repairs necessary entirely to make good the injury sustained by the vessel, less the usual allowance of one-third of the cost; this proportion of the amount expended for repairs being the sum ordinarily payable by underwriters on the occurance of a partial loss where the ship is an old one, as this was, and is not repaired. The majority of the

judges of the Court of Appeal, however, upheld the judgment of Lindley, J. Brett, L.J., dissented. He says:—"The cost of repairs is the matter to be indemnified . . . The defect of the judgment under review seems to me, with deference, to be that it has misapplied the doctrine that a contract of insurance is only a contract of indemnity. It is true that it must not more than indemnify against the loss which it covers; but it is also true that it has nothing to do with gains or losses which are outside the contract, by which it undertakes to indemnify against the losses which it does cover." The view of Lindley, J., below, and of the majority of the judges of appeal, seems concisely indicated in the following passage from the judgment of Cotton, L.J.:—"To hold that in the present case the insured is entitled to recover two-thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases, that the policy is a contract of indemnity; or to adopt the words of Willes, J., in *Lidgett* v. *Secretan*, L.R. 6 C.P. at p. 626, the insured is not entitled to recover more than he lost by the injury sustained by the vessel through the perils covered by the policy." And after a review of the authorities, he says:—"In this state of the authorities I am of opinion that the estimated cost of repairs, less the usual allowance of one-third new for old, is not, *under all circumstances*, the sum which the insured is to recover. Where, as in the present case, there is not a constructive total loss, he is not, as against the insurers, entitled to sell so as to bind them by the loss resulting therefrom; but when he elects to take this course, as in the present case, he, as against himself, fixes his loss, that is, he cannot as against the underwriters say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. Probably the most accurate way of stating the measure of what, under such circumstances, he is to recover, is that it will be the estimated cost of repairs, less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale." In conclusion it may be worth while to quote a *dictum* from Brett's, L.J., dissenting judgment, where he says:—"One is naturally startled at the facts of the present case; but they are wholly abnormal, and it is in my opinion most dangerous to mercantile business to tamper with a settled rule of adjustment of liability and claim in order to meet a case which will in all probability never happen again." It will be seen that where the Court of Appeal differs from him is as to what is the settled rule of adjustment of liability in such matters.

PRINCIPAL AND AGENT—MEASURE OF DAMAGES.

The next case, *Cassaboglow* v. *Gibbs*, p. 220, is a decision of the Q. B. Divisional Court as to the measure of damages where commission agents of the plaintiff abroad have intentionally sent home to him goods of an inferior quality to that which he ordered. The plaintiff sought to treat the agents as vendors of the goods to him, so as to make them responsible as for a breach of warranty of the kind and quality of the goods, in which case the measure of damages would be not merely the difference between the cost to him of the goods and their real value, but the difference between the value of goods of the description sold and of the goods actually sent. The Court, however, held the plaintiff was not entitled to recover from the defendants anything beyond his actual loss.

CONTRACT WITH AN ILLEGAL ASSOCIATION.

The next case is *Jennings* v. *Hammond*, p. 225. In it the Divisional Court, having decided that a certain society called the "Ipswich Mutual Benefit Society" was illegal, by reason that it did not conform to the requirements of Imp. 25-26 Vict. c. 89, s. 4, as to the registration of such a society, proceeded to hold that, therefore, a promissory note given by a member to the trustee of the society to secure a sum of money advanced to such member under the rules of the society was invalid, and no action could be maintained

thereon. The judgment of the Court says:—"If, as we hold is the case, the association is forbidden by the Act in question, it follows that all contracts *made directly for the purpose of carrying on the business of the association* are illegal. In this case the business of the society is to lend money, and consequently the loan to the defendant was made in pursuance of an illegal object, and the note sued on was given for an illegal consideration, and cannot be sued upon either by the society or by any one suing as a trustee for the society, or even by any one suing for his own benefit if he took the note with a knowledge that it was given for an illegal consideration. With this case may be contrasted the recent English case of *in re Coltman*, L. R. 19 Ch. D. 64, noted *supra*, p. 130, though it is not cited in *Jennings* v. *Hammond*.

SPECIAL CONDITION EXCLUDING LIABILITY OF CARRIER.

The next case, *Brown* v. *Manchester and Sheffield Ry. Co.*, p. 230, is a decision as to whether a certain condition made by a railway company as to their liability in respect of the carriage of goods, was "just and reasonable," within the meaning of the Imp. Railway and Canal Traffic Act, 1854, sect. 7, which makes every such condition subject to the opinion of any judge before whom any question may be tried relating thereto, whether the same was *just and reasonable*. In Mr. J. E. McDougall's lectures on "Torts and Negligence," recently published, he remarks with regret on the absence of any similar statutory provisions in Canada, limiting the common law power of carriers to restrict their liability by special contract. He cites, in support, the words of Draper, C.J., in *Bates* v. *Great Western Ry. Co.*, 24 U. C. R. 544.

VALUATION OF DAMAGE MADE CONDITION PRECEDENT TO ACTION.

In the next case, *Babbage* v. *Coulburn*, p. 235, it appears that by a written agreement a tenant of a furnished house agreed, at the expiration of the tenancy, to deliver up possession of the house and the furniture in good order, "and in the event of any loss, damage or breakage, otherwise than herein provided for, the same to be made good or paid for by the tenant, the amount of such payment, if in dispute, to be referred to and settled by valuers, one to be appointed by the landlord and the other by the tenant or their umpire, in the usual way." The Divisional Court held the settlement of the amount of the payment by the valuers was a condition precedent to the right of the landlord to bring an action in respect of the dilapidations. Huddleston, B., observes:—"The question in all these cases is whether or not there are separate and independent covenants—a covenant that an act shall or shall not be done, and a covenant to refer. Here the defendant agreed to deliver up the furniture in a certain condition, and agreed, not independantly to refer, but to deliver up the furniture and pay any sum awarded by the valuers."

ESTOPPEL.

There is nothing requiring notice, except a *dictum* of Holker, L.J., in the bankruptcy case of *Harris* v. *Truman*, p. 296, that "the doctrine of estoppel ought not to be extended," until *Clark* v. *Wood*, p. 276, is reached.

PRACTICE—AMENDMENT BY COURT OF APPEAL.

This case besides being a decision as to the power of the Court of Appeal to amend the record of trial, under Imp. O. 58, r. 5, with which compare R. S. O. c. 38, sect. 22, in a case where the judge of first instance could have amended the record had application been made to him at the time, also decides the following point:

AGENT FOR SALE OF REAL ESTATE—CONDITION PRECEDENT.

The plaintiff claimed for commission on the sale of a piece of land by A. to the defendant. One term of the plaintiff's contract was that A.'s title should be approved by defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's

solicitor. The Court of Appeal held, nevertheless, that the plaintiff could not succeed without, in the language of Jessel, M.R., first giving "*prima facie* evidence either that the title was approved or that there was a good title, but that the defendant's solicitor unreasonably and improperly refused to approve it."

LIABILITY TO STRANGER FOR DEFECTIVE ARTICLE.

The next case requiring notice is *Heaven* v. *Pender*, p. 302, where the plaintiff was a painter, who was employed by a certain shipowner to paint a ship, and in the course of his work fell from a staging, erected round the ship for the owner by the defendant, and was injured. He now sued the defendant for damages. The evidence showed that the defendant had no control over the plaintiff during the progress of the painting. The staging had been put up on the same day that the accident happened; but there was no evidence to show its condition when the staging was put up, or that the defendant or his servant had any knowledge that the rope was defective. Under these circumstances the Divisional Court held the plaintiff had sued the wrong person, for the defendant was not liable, for he had no duty towards the plaintiff to supply a reasonably safe staging. Field, J., says:—"In order to support the action the plaintiff must show either the existence of a contract between himself and the defendant and a breach by the defendant, or that some relation existed between them which created a duty from the defendant to the plaintiff to use due and reasonable care, and that the defendant was guilty of a breach of that duty . . . There is no contract between the plaintiff here; no fraud on the defendant's part; no breach of duty, to tell the truth, as in *Langridge* v. *Levy*, 2 M. & W. 579; 4 M. & W. 337." He also says:—"I think the evidence shows that the defendant parted with the control of his staging as a landlord does with the control of his property when he lets it," with reference to which we may refer to the case of *Ivay* v. *Hedges*, L.R. 9 Q.B.D. 80, noted in these pages *supra* p. 376.

In this same case of *Heaven* v. *Pender*, Cave, J., distinguishes the case which illustrate the proposition of law, which he thus enunciates:—"Where a licensee goes upon or uses the property of his licensor for purposes in which the licensor is interested, there is a duty cast upon the licensors to see that the licensee is not exposed to unusual danger; and for a breach of that duty the licensor is responsible. The rule applies equally to where the property is land or a thing to be used, as the staging was here; the duty arises out of the possession and control of the thing—not of the property in it."

LAWFUL ASSEMBLY—UNLAWFUL CONSEQUENCES.

The next case *Beatty* v. *Gillbanks*, p. 308, really involved the question whether the notorious Salvation army was responsible for the riotous conduct of the infamous Skeleton Army. There was no doubt the Salvation Army were in the habit of assembling with others for a perfectly lawful purpose, but with a knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it. The Divisional Court held they could not under such circumstances be rightly convicted of an unlawful assembly. Field, J., says:—"As far as these appellants (the Salvation Army) are concerned, there was nothing in their conduct when they were assembled together which was either tumultous or against the peace. But it is said, that the conduct pursued by them on this occasion was such, as on several previous occasions, has produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants knowing when they assembled together that such consequences would again arise, are liable to this charge. Now, entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of

acts of the appellants they would be liable. But the evidence in this case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them."

There is no other case in this August number of L. R. 9 Q. B. D., requiring notice, the last case *Eynde* v. *Gould*, p. 335, being on a point of practice under the Judicature Act, and already noted among our Recent English Practice Cases, *supra* p. 326. Neither do the two cases in the August number of L. R. 7 P. D. require to be mentioned being one a case on the practice of the Admiralty Division, and the other a divorce case.

A.H.F.L.

SELECTIONS.

THE LEGAL POSITION OF THE SUEZ CANAL.

International rights over artificial waterways from sea to sea, and their relation to those of the power owning the territory in which such ways are situated, will probably form an important branch of the international law of the future. At present there are hardly any instances upon which a discussion of such rights can be founded. But in view of the important questions which must soon be settled as to the Suez Canal, it may be interesting to examine what the legal position, so far as law can be held to apply to a subject matter so new and so anomalous, as that undertaking is.

The relations of the company to the Egyptian Government and its suzerain are defined by concessions granted by the Khedive in 1854 and 1856, and finally ratified by the Sultan's firman of the 22nd of February, 1856.

The most important articles provide that the canal shall be kept open at all times as a neutral channel to the merchant ships of all nations without distinction or preference, the company being allowed to charge a toll not exceeding 10 francs per ton. The company is declared to be an Egyptian one, and all disputes between it and the Egyptian Government or third parties are to be decided by the local tribunals according to the laws of the country and to treaties; but as regards its internal affairs, and the rights of its shareholders, it is declared to be a French *Societe Anonyme*, and subject to the laws regulating such societies. The canal and its dependencies are made subject to the police of the Egyptian Government, in the same manner as the rest of its territory. Certain land upon the banks is given up to the company, but the government reserve power to take back and occupy any points of strategic importance, agreeing not to interfere with the navigation of the canal. The concession terminates at the end of ninety-nine years, unless a fresh agreement is entered into, and it is provided that the 15 per cent. share of profits given to the Khedive is to be increased by 5 per cent. on every such fresh agreement till it has reached 35 per cent.

There is nothing in this concession which in any way abandons the sovereign rights of the Egyptian Government or its suzerain, the Sultan, over the canal, nor which gives any rights to any other power. It is simply a private contract between the Khedive and the company, ratified by the Sultan. Acting upon this view the company, soon after the opening of the canal, obtained leave from the Sultan to charge a sur-tax of one franc per ton for the passage of vessels, and they then further increased the toll without such leave by charging upon what they considered the actual capacity instead of, as at first, upon the registered tonnage of vessels using the canal. The Sultan, pressed by the powers to put an end to this exaction, called a conference in October, 1873, at Constantinople, to agree upon a general standard of tonnage. The conference wisely refused to embark upon this general question, but agreed upon a mode of measurement which they considered fair for the Suez Canal, and recommended the Porte that the company should be compelled to adopt this measurement, and at the same time should be allowed to charge a sur-tax of three francs per ton, to be reduced upon a sliding scale as the tonnage of ships using the canal increased. The Porte accepted these recommendations, and at the same time voluntarily declared that the Turkish Government would not allow any increased toll to be levied without its consent, and would come to an understanding with the principal powers interested before coming to a decision.

The Powers throughout the negotiation recognized the absolute right of the Porte to regulate the tolls, and the recommendations of the conference were carried out as the act of the Porte. The company refused to accept the terms agreed upon, and even issued a notice that the canal would be closed. They only yielded under pressure of the despatch of an Egyptian force to seize the canal; and accepted the new dues only under protest until 1876, when an agreement was come to slightly modifying in the company's favour the terms imposed by the conference. About the same time a dispute arose as to jurisdiction, the company claiming to have all disputes in which they were concerned tried by the French Consular, instead of the Egyptian Court. The French Government, however, repudiated any claim that the company was solely under French jurisdiction, and the controversy came to an end on the establishment of the international tribunals in Egypt in 1874. The purchase of the Khedive's shares by the English Government, though it gave the Government a *locus standi* to enforce the rights of the company in the agreement with the Khedive and the Sultan, could not affect its international position, and some negotiations, which were started shortly before that purchase, for the handing over the management of the canal to an International Commission, fell to the ground before the decided opposition of the Porte. At the outbreak of the Russo-Turkish war, M. de Lesseps proposed a general agreement between the European Governments, that the canal should at all times be open for ships of war as well as of peace, the disembarkation only of troops and munitions of war being forbidden. Lord Derby, however, refused to entertain the proposal of any such agreement, and contented himself with a notice to both the belligerent governments that any attempt to stop the canal would be incompatible with the maintenance of Her Majesty's Government of passive neutrality. It would seem, therefore, that there are no special international obligations affecting the Suez Canal at all. It is simply a part of the territory of Egypt and her suzerain the Sultan, subject in all respects to their control, but leased for ninety-nine years to a company formed under and governed by French law, upon terms which, in so far at least as regards the tolls to be levied for passage, the Sultan has voluntarily declared he will not alter without consulting the Powers. It is also subject to whatever rights of user can be claimed over it by international law in consequence of its being one of the highways of the world, and the only passage between two open seas, which rights have been to some extent recognized by the voluntary declaration of the Sultan above referred to. What the measure of such right may be it is impossible to say, but they cannot be greater than those which obtain in a natural strait between two seas where both shores are in the territory of the same power. It seems to be the accepted opinion of the jurists that in such a case, while the territorial power has no power to prevent the passage of merchant ships, no other power has a right to claim passage for ships of war, or troopships. In law, therefore, as well as in fact, the canal can only be kept open for English troopships and ships of war either by special treaty with all the European powers or by England's possessing in some form or another the control of the territory within which the canal is situated.—*Law Times.*

REPORTS.

ONTARIO.

(Reported for the LAW JOURNAL.)

COUNTY COURT OF THE COUNTY OF MIDDLESEX.

BERTRAM v. BAWDEN.

Solicitor and Client—Costs—Arrest.

A solicitor's claims against his client for fees and disbursements is not a claim for costs which exempts the client from arrest for non-payment of costs.

[London, Oct. 24—Davis, J. J.

Defendant was arrested on a capias for plaintiff's fees &c., as a solicitor, in connection with the defence of the defendant in an action in the H. C. J.

A. J. B. Macdonald for defendant applied to set aside the order for capias, &c., on the ground that the plaintiff's claim was for costs and that defendant could not be arrested for non-payment of costs:—Sec. 3 cap. 67 Revised Statutes Ont.

Bartram shewed cause.—The action is for the solicitor's fees against his client, and not for his costs—when defendant pays the fees, &c., they will become the defendant's costs. The statute refers to costs between party and party. There are no costs between solicitor and client except

perhaps when the costs of the client are ordered to be paid by a third party. If defendant cannot be held to bail for this claim then solicitors are worse off than any other class ; but such is not the case—sec. 42 cap 140 R. S. Ont. shews this. There do not appear to be any decided cases upon the point, probably because no client ever attempted to treat his solicitor so unfairly.

DAVIS, JUNIOR JUDGE.— I am of opinion that the plaintiff's claim is not for costs within the meaning of the statute and that defendant was properly arrested. The application is therefore dismissed.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

TRUST AND LOAN CO. v. LAWRASON ET AL.

Mortgage—Distress clause—Tenancy at will.

A mortgage made in pursuance of the Short Forms of Mortgages Act contained the following :—"And the mortgagor doth release to the Company all his claim upon the said lands, and doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." It also provided that the mortgagees, on default of payment for two months, might, on one month's notice, enter on and lease or sell the lands ; that they might distrain for arrears of interest, and that until default of payment the mortgagors should have quiet possession.

The sheriff, under an execution at the suit of respondents against the mortgagors, who had been in possession from and at the time of the execution of the mortgage, seized the goods of the mortgagor on the lands mortgaged. Before sale and removal of the goods, but after seizure, the mortgagees (the appellants) claiming as landlords of the mortgagor, claimed one year's rent.

Held, (per STRONG, FOURNIER and HENRY, J.J., affirming the judgment of the Court of Appeal : 6 Ont. App. R. 286), that there was no rent fixed for which there was power to distrain, and the appellants could not claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal by the sheriff.

(Per Sir WM. RITCHIE, C. J., TASCHEREAU and GWYNNE, JJ.,) that a tenancy-at-will was created by the mortgage at a fixed rent, viz., the amount of the interest payable at fixed times, and that under such demise the interest, on default in payment of it, became payable *qua* rent, and liable to be distrained for as rent ; the right to distrain not being a mere collateral license but a right of distress incident to a tenancy.

The Court being equally divided, the appeal was dismissed without costs.

Marsh, for appellants.

Kerr, Q.C., and *Wilkes*, for respondents.

ELECTION CASES.—QUEEN'S BENCH DIVISION.

Cameron, J.] [Oct. 20.

IN RE RUSSELL ELECTION.

Dominion Election—Entitling petition—Deposit in Q. B.—Security.

The O. J. Act has not superseded the Q. B. as a Court for the trial of Dominion Controverted Elections.

Here petition was "In the Q. B., H. C. J., Q. B. D.," and deposited with a clerk in the Q. B. D., with whom and in which the Q. B. business was formerly transacted, and the clerk entered it in the procedure book of the Q. B. D.

Held, that the words "H. C. J., Q. B. D." in the entitling of the petition might be rejected as superfluous, and the petition was properly presented in the Q. B., and that the entry in a wrong book ought not to prejudice the petition.

Bethune, Q.C., for petitioner.

McCarthy, Q.C., and *Creelman*, contra.

IN RE WEST HURON ELECTION.

Controverted election (D.)—Preliminary objections—Agency—Interference of Ont. Gov.—Votes struck off when seat not claimed.

The H. C. J. has no jurisdiction in Dominion Controverted Elections.

On an allegation that Ontario Government, in behalf of respondent, used undue influence, an objection that no agency was stated, and because no such agency, if stated, could in law exist, was *held* proper to be left for disposition by Judge at trial. Also, that a petition need not state the grounds which void an election in order to be

free from objection in special demurrer, but that facts whose existence would void it should be shown.

McCarthy, Q.C., and *Creelman*, for petitioner.
Shepley, contra.

QUEEN'S BENCH DIVISION.

Cameron, J.] [Oct. 20.

REGINA V. BENNETT.

Temperance Act, 1878—*Information—Different offences—Amendment when case closed—Proof of order in council—Constitutional law—Right to appoint Justices of Peace.*

32-33 Vict. ch. 31, s. 25, is violated by an information which includes the three offences of keeping for sale, selling and bartering intoxicating liquors prohibited by s. 99 of Imperial Act of 1878.

A magistrate cannot judicially notice orders in council or publication thereof, unless proved by production of the official *Gazette*.

The Ontario Legislature had power under No. 14 of sect. 92, B. N. A. Act, to pass ch. 71 R. S. O. as to appointing Justices of Peace.

Irving, Q.C., for the Crown.
McCarthy, Q.C., contra.

CHANCERY DIVISION.

Proudfoot, J.] [Nov. 8.

HOPKINS V. HOPKINS.

Will—Invalid devise—Possession—Statute of Limitations.

A devise of land to J. H. in fee, was void on account of J. H. being a witness to the will. The devise was subject to a lease which had nearly twelve years to run from the death of the testator, as to which the testator directed the rent payable thereunder to be paid one half to J. H., the other half to his executors, to be invested, and principal and interest paid to J. H. as the executor might think he required it. The executor, assuming the devise to be valid, paid the rent to J. H. The latter executed a deed of the land to C. H., who received the rents thereafter through J. H., with the privity of the executors. C. H. went into possession after the expiration of the lease.

Held, that the direction as to the rents was void, as they belonged beneficially to J. H.; and also, following *In re Geffe*, 8 P. R. 92, that the rights of the true owners had been barred by the receipt of the rents by J. H. and C. H.

Proudfoot, J.] [Nov. 8.

GILLIES V. MCCONOCHIE.

Will, construction of—Charities—Mixed fund—Cy pres—Administration of fund—Jurisdiction.

A gift to a charity out of a mixed fund is valid, if there be enough pure personalty to answer the bequest.

The testator who was a minister of the United Presbyterian Church of North America, after bequeathing $1,000 to that church, provided:—"I give for a Jewish Mission the sum of $1,000, to that Church which is sound and Evangelical in doctrine, and pure in worship, using in songs of praise the inspired books which can unite all nations, Jews and Gentiles, in all ages," etc. The witnesses said that this description could only apply to one other church besides that to which the testator belonged; but it did not appear that his church had a mission to the Jews, or was willing to apply the legacy for that purpose.

Held, that the testator intended the bequest for his own church, and a reference was directed to enquire as to the missions, etc.

"To the pious, poor, converted Jews that meet together for the reading of the Scriptures for their instruction and mutual edification, I leave $1,000. . . . The balance of my estate I leave to the poor and destitute, to supply their temporal wants in food and raiment."

Held, that the first bequest was a good charitable bequest, and not void for uncertainty; and that the second was also good so far as the residue consisted of pure personalty. That there should be enquiries whether any such Jews were to be found, whether there were any poor in the congregation of which the testator was pastor who needed assistance, or whether he had any poor relations.

Held, also, that as to the bequests to the Jewish mission, and to pious, converted Jews, if the above church would not accept the former, or if no such pious Jews should be found, the Court would administer the funds *cy pres*.

There were no trustees of the funds appointed, but the testator appointed executors.

Held, that it was their duty to pay the legacies, and, therefore, that the administration should be by a scheme before the Master, and not by the Crown.

D. A. Creasor, for the plaintiffs.

Platt, for the church.

Creasor, Q.C., for the widow.

J. R. Galbraith, for next of kin.

Divisional Court.] [Nov. 11.

IN RE HALL.

Extradition—Ashburton Treaty—Forgery—Uttering.

The prisoner was a clerk in the office of the Comptroller of the City of Newark, New Jersey, U. S. A., his duty being to make proper entries of moneys received for taxes in the official books of the Comptroller, provided for that purpose. Having received a sum of money for taxes, he entered the correct amount at first, and then erasing the true figures, he inserted a less sum with intent to benefit himself by the abstraction of the difference between the two, and to deceive the Comptroller and the municipality.

Held, that the offence was forgery at common law, and the prisoner was remanded for extradition.

Per PROUDFOOT, J.—Uttering is not necessary to constitute the crime of forgery, but if it were, the entry in books of the public character of those in question, would be published as soon as made. The offence with which the prisoner was charged, is forgery within 32-33 Vict. cap. 19, ss. 26, 45.

Fenton, for the United States.

Murphy, for the prisoner.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Nov. 3.

GOWANLOCK V. MANS.

Jury notice—Exclusive jurisdiction of the Court of Chancery—O.J.A. sect. 45—O.J.A. sect. 4.

An action in which the principal relief sought is the reformation of a lease is an action in the exclusive jurisdiction of the Court of Chancery, the trial of which must, by sect. 45 of the O. J. A., be according to the practice of the Court of Chancery at the time when the O. J. A. was passed. A jury notice in this case was held irregular, and struck out with costs.

A "purely money demand" under sect. 4 of the O. J. A. defined.

Clement, for the motion.

H. J. Scott, contra.

Mr. Dalton, Q.C.] [Nov. 7.

TURNER V. KYLE.

Seduction—Examination.

In an action for seduction, an application under Rule 224, O.J.A., for the examination of the plaintiff's daughter as a person for whose immediate benefit the suit was brought, was refused, but an order was granted under Rule 285, as it was necessary that the defendant should be informed before the trial, of the case he would have to meet.

Fenton, for the motion.

A. McDougall, contra.

Boyd, C.] [Oct. 10.

VERMILYEA V. GUTHRIE.

Transfer—Jury—Trial.

Held, (1) that where an action is brought in the Chancery Division, and it is a proper case for that Division, the plaintiff will not be allowed to transfer it to another division, either on the ground that he wishes it tried by a jury, or that a transfer would expedite the trial.

(2) That an action for the infringement of a patent should not ordinarily be tried by a jury.

Clement, for plaintiff.

Hoyles, for defendant.

Mr. Dalton, Q.C.] [Oct. 12.

CLARKE V. MCEWAN.

Statement of claim—Filing and delivery of—Time.

A statement of claim was filed and delivered more than three months after appearance entered.

Held, that the action could not be dismissed as the statement of claim had been filed before notice of motion to dismiss was served, and on

the facts of the case leave was given to deliver the statement of claim.

Holman, for the motion.

Symons, contra.

Mr. Dalton, Q.C.] [Oct. 13.

CANADA PERMANENT LOAN AND SAVINGS CO. v. FOLEY.

Action for recovery af land—Place of issue of writ.

Held, that a writ for the recovery of land may be issued from the proper office for any county without reference to the locality of the lands, but that the trial must take place in the county where the land lies.

C. J. Leonard for the plaintiffs.

H. J. Scott for the defendants.

Boyd, C.] [Oct. 17.

FISKEN v. CHAMBERLAIN ET AL.

Examination before appearance.

An action by a creditor of the defendant Chamberlain to have a conveyance of land which the defendant agreed to purchase, conveyed to the plaintiff in satisfaction of a debt due from defendant to plaintiff, and for an injunction to restrain the owner of the land (defendant Somerville), from conveying the land to Chamberlain or any other person.

The plaintiff, before the defendant Somerville had appeared, obtained an order *ex parte* under Rule 285, O. J. A., for his examination, alleging that he wished to ascertain the name of the person to whom Somerville had conveyed the land in question, in order to prevent alienation to an innocent purchaser.

Caswell now moved to rescind the order for the examination of the defendant Somerville.

W. Read, for plaintiff, contra.

The MASTER IN CHAMBERS dismissed the application.

The defendant appealed on the ground that an order for examination for discovery cannot be made till after defence is filed, and that Rule 285, O. J. A., does not apply to examinations for use at trial.

BOYD, C., dismissed the appeal with costs.

Proudfoot, J.] [Oct. —.

JOHNSTON v. JOHNSTON.

Redemption — Dismissal of bill — Reinstating same — Purchaser from defendant — How affected.

A sum of money was directed to be paid by the plaintiff to the defendant, upon which the latter was to convey to the former the lands in question. By mistake the money was paid into Court in a wrong cause. The defendant as upon a default got the bill dismissed. The money was transferred to the proper cause as soon as the mistake was discovered. The defendant, after the Bill was dismissed, sold the land to a purchaser. Subsequently the Master in Chambers set aside the order, dismissing the bill, on the ground that the defendant and his solicitors were aware of the mistake in payment of the money. The purchaser applied to set aside the Master's order, reinstating the bill.

Held, that the order was right.

Shepley, for the motion.

Patterson, J. A.] [Oct. 19.

THURLOW v. BECK.

Trial by jury in Chancery Division.

Held, that in an action which previous to the O. J. A. could have been brought in the Court of Chancery only, a defendant has no right as of course to a trial by jury, and that under the R. S. O. cap. 40, sec. 99, the Court of Chancery, upon notice and for good cause, might direct a trial by jury; this power could be exercised only by a judge, and not by the Master in Chambers.

McClive, for motion.

R. Martin, Q.C., and *R. Martin* (Cayuga), contra.

Mr. Dalton, Q.C.] [Oct. 25.

BLAIN v. BLAIN.

Irregularity—Motion against—Setting out grounds.

Held, that upon a motion to set aside a proceeding for irregularity, the notice of motion need not specify the irregularity complained of, if it sufficiently appears from the affidavits and papers filed in support of the motion.

H. Cassels, for the motion.

Hodgins, Q.C., contra.

CORRESPONDENCE.

Contracts by Married Women.

To the Editor of the LAW JOURNAL.

SIR,—*Lex*, in writing from Pembroke, in the last issue of your journal, asks: "Can a married woman, living with her husband, and not carrying on any separate business from her husband, but having separate estate, and married since the 4th May, 1859, contract with reference to her separate estate?" The Courts have held that she most decidedly can, (see *Lawson* v. *Laidlaw*, 3 App., and cases there cited.) There is no doubt that under R.S.O. cap. 125, and the case law touching married women, that a married woman can contract as to all her separate estate, real and personal, and having contracted, all the separate property of which she is possessed is liable, subject, however, to this limitation, that only such property as she had at the time she contracted is bound by the contract. It is held in *Lawson* v. *Laidlaw*, that personal property enjoyed by a married woman, under the statutes of 1858 and 1872, is her separate property at law to the same extent, and with the same incidents, as property settled to her separate use was and is in equity, and therefore, on the principles of equity, whenever a married woman contracts a debt, (be it private, relating to separate business, or no matter what it relates to, as long as it is a debt for which, if made by a man, he would be liable), she is deemed to have contracted it with reference to her separate property, and intending that it shall be paid out of that property. This presumption is of course rebuttable. *Lex's* difficulty is the disability of a married woman to contract at law. The disability of coverture is a creature of society, of custom, that is of the common law. As such it can be encroached upon either by the legislature or by the judges, under their discretionary powers, which they had and exercised in the equity courts. This common law disability of coverture, and of a married woman having no separate existence apart from her husband was first infringed upon by the equity Judges, holding that as to certain property she had an existence, and that as to such property she had a legal and individual capacity separate from her husband of assenting to a disposal of it by contract or otherwise. In short, as to the whole equitable doctrine of a wife's separate estate, all the English statutes, and our own statutes referring to married women and their estate, have as of necessity begun with giving a married woman a legal separate existence, and of considering her as without the coercion and dominion of her husband in so far as is necessary for the full working of the law of the property of married women. *Lex's* opinion on this point is, I submit, untenable.

Yours, LAW STUDENT.

Hamilton, Nov. 6, 1882.

[One of the most recent decisions in reference to this matter is *Pike v. Fitzgibbon*, L. R. 17 Ch. D. 455, in which the Court of Appeal held that the general engagements of a married woman can be enforced only against so much of the separate estate to which she became entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as might remain at the time when judgment was given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation.—EDS. C. L. J.]

BOOK REVIEW.

COPYRIGHT IN BOOKS, an inquiry into its origin, and an account of the present state of the law in Canada. By S. E. Dawson. Montreal: Dawson Bros., Publishers, 1882.

This dissertation is in the form of a lecture, and was delivered before the Law School of Bishop's College, Sherbrooke, P.Q. We began at the end and found this passage:—"And now Mr. Chairman and Gentlemen, I hope I have not wearied you. I hope I have not left your minds in the same condition as that of a celebrated Minister of State in England who had listened for an hour to a deputation about Copyright. 'Gentlemen,' said he, 'before you commenced I thought I knew a little about Copyright; now I know I never did know anything about it; and what is more, I never shall.'" Then we dived into the middle, and finally read it through, and are prepared to say that we at least were not wearied by the perusal, but very much instructed and interested. Not only does Mr. Dawson appear to have a knowledge of the subject in its many intricate ramifications, but he gives out his knowledge in a manner calculated

to impress it forcibly on the minds of his readers. We cannot do better than spare a little space for a reproduction of some passages, as sample bricks of an excellent building. The lecturer commences with a luminous historical review of the origin of copyright, and devotes several pages to the controversy as to whether it exists by Common law, or is only a creation of the Statute Law. In speaking of literary productions as property, he says :—

"The law has always made a distinction between literary property and other property, and in spite of all that has been written this distinction is both necessary and just. It is in itself right and proper to reward literary labour; and it is, moreover, to the interest of society generally, that authors should be encouraged to write, precisely as inventors are stimulated by the Patent Laws; but an author does not create a new thing by his own labour. Much of his work is of necessity borrowed. Chaucer took his 'Canterbury Tales,' some from Gower, and generally from Boccaccio, Petrarch, and the Italian story tellers. None of Shakespeare's plots are original, and of Milton's 'Lycidas,' not only the framework, but whole lines are adapted from Theocritus. If this be the case with the great writers, how much more do the smaller ones enter in upon the labours of their predecessors? The number of original works is very small; and if the conditions demanded by the title of *occupancy* were strictly enforced, there are very few works in the world which would comply with its requirements. If copyright and patent right were perpetual, the whole intellectual and physical world would be parcelled out by inheritance into small holdings, interlaced so that the courts and judges would be occupied for ever in interminable discussions upon tangible things. The claims put forward by the writers on this subject will not bear investigation. They are for the most part special pleaders, and they go too far afield for their illustrations. Thus Mr. Drone is arguing for the perpetuity of literary property, as the result of labour, and he adduces an incident in the Book of Genesis, where Abraham digged a well; and he says that Isaac one hundred years later successfully vindicated his claim to it because his father dug it. This excursus into Philistine law is characteristic of much of the writing upon this subject. It is law run mad. Upon the laws of the Hittites, Hivites, Perizzites, or Jebusites, 4,000 years ago, Mr. Drone is no better an authority than Mr. Morgan on Roman Law. If there be one thing clearer than another in the whole Book of Genesis, it is that the only real estate which Abraham possessed in Palestine was the field he bought of Ephron the Hittite. . . . The fact simply is that literary property is a recent creation, first of prerogative, then of statute —reasonable, just, and right — and that, in creating it, the law has put such limitations upon it as are necessary for the general good. We have seen that the first privilege on record, which was granted by Henry VIII., was for 7 years; the Act of Queen Anne was for 14 years; the Act of George III. was for 28 years; the Act of Victoria was for 42 years; the proposed new Act is for 50 years. The time is continually extending, and the copyright holders are still dissatisfied, and clamour for a perpetuity of monopoly. Few copyrights, as a matter of fact, are held by authors. They are held by capitalists, the large publishing houses, who would like them to go down from generation to generation. Jacob Tonson set up his carriage out of Milton's 'Paradise Lost,' for which Mrs. Milton got eight pounds. I am not arguing against literary property, nor against the just right of an author to his reward. Those who enjoy the fruit of his labour should pay for the privilege; but I am arguing against the demand to enclose in perpetuity the common ground of intellectual life; against the demand to vest in the descendants of authors, or of capitalists who have bought up author's rights, a property which *they*, at least, did not create; a property, moreover, intangible, difficult to define and keep separate, and which in a few generations would become hopelessly intermingled. Then, also, many great works might be suppressed as opinion changed from age to age, and a Puritan heir might suppress the works of Shakespeare, or a Jacobite lock up or expurgate the works of Milton. So far was the Parliament of Queen Anne from supposing that literary property was of so sacred a nature, that they inserted in their Act a clause by which anyone or a number of high officials could reduce the prices of books which might be thought unreasonably high; and this was in the very first Copyright Act ever passed by any nation. . . . The only persons who would be benefited by perpetuity of literary property would be the great publishing houses and corporations, and the dominion of capital would be extended into the intellectual world by a species of literary syndicates."

In speaking of the present state of the law in Canada, Mr. Dawson gives a sketch of our Act of 1875, which begins as follows :—

"I come now to the Canadian Act of 1875. Those who had to do with the framing of that Act were perfectly familiar with the state of the English and American law. They could not touch the Imperial Act, so they ignored it. They were careful not to allude to it in any way while avoiding collision with it. So jealous are the English publishers of any Colonial copyright legislation that the Act was reserved by Lord Dufferin under special instructions. On its arrival in London, the customary storm of misrepresentation and abuse broke out in the *Times* and other London newspapers. The Publishers Association sat upon it, and various legal luminaries were called in. But finding that the Act was strictly a local Act, within the powers of our

Parliament, the Queen was advised to assent to it, and the following year it became law.

The first principle underlying the Canadian Act is that of reciprocity. It concedes to other nations the same privileges which other nations concede to Canadians. The United States demand that all who avail themselves of their law shall be citizens or residents, and they refuse international copyright to other nations. The Canadian Act, in describing the status of those who come under it, specifies:—'All persons *domiciled* in any part of the dominions of Great Britain, or who are citizens of any country which has an International Copyright Treaty with Great Britain,' and only those who shall share in the benefits of the Act. Mark Twain did not fall under either of these categories, and the Canadian authorities were quite right in refusing his copyright. If the papers had been issued they would have been perfectly worthless at law. Those who advised the Government in drawing up the Canadian Act, knew that the word *resident* was interpreted by the United States courts in the narrowest sense—to signify a person residing in a country *animo manendi;* and they knew also that the English courts held the word in its widest possible meaning to signify the mere momentary presence of the author at the moment of publication. They crossed the word *resident* out of the draft bill and inserted the word *domiciled*, for the purpose of making the law in Canada precisely correspond to the law in the United States. In making his first application, Mr. Clemens acted under the advice of a distinguished Boston lawyer, who was not aware of the distinctness and precision of the word 'domicile' in the Civil Law. He was misled by a false induction from our Patent Act, and by a false induction from the case of *Low* v. *Routledge*, which had no reference to our statute. He was misled, as all lawyers will be misled who (even if they live in Boston) presume to advise upon the laws of foreign countries. Mr. Clemens, however, could fall back upon the Imperial Act, by virtue of which he now holds his book. We are then face to face with a startling anomaly—the Copyright which our Parliament refuses, the English Parliament grants, and the book which cannot be printed in Canada without the author's consent, can be imported from abroad.* In many respects Mr. Clemens is entitled to sympathy; for the Toronto people were very aggressive, even advertising in the United States papers to supply their cheap editions by post on receipt of the twenty or thirty cents of price. But then the Americans have the remedy in their own hands. The moment an International Treaty is made they will come under our Statute by its very terms. They cannot hoodwink the Canadians as they do the English people, and I am sure they will never get from the Canadian Parliament anything but reciprocal rights. . . . It might be asked, where is the need of a Canadian Act if the Imperial Act is in force in Canada? It is needed because the English Act is drawn solely in the interests of British publishers. If a Canadian author publish his book first in Canada he loses Imperial copyright. Consequently our Act was passed to confer local copyright, conditioned on local publication; and, moreover, it is only under our local law that importation can be prevented. Consequently, if a Canadian author takes the option of publishing under the English Act alone, his book may be set up say at Rouse's Point, and imported on payment of a duty of 12½ per cent. additional to the regular 15 per cent. on all books."

* This has, in fact, been since done. Debarred by the Act of 1842 from printing this book in Canada, the work was printed out of the country, and the sheets worked off there, were then imported into Canada on payment of the 12½ per cent. duty previously referred to.

Chapters on the Law Relating to the Colonies, with a topical index of the cases, decided in the Privy Council on appeal from the colonies. By James Tarring, of the Inner Temple, barrister-at-law. London: Stevens & Haynes, Bell Yard, Temple Bar, 1882.

One might have thought that the elaborate works of Mr. Alpheus Todd had given all necessary information on questions of colonial law and the relations of the colonies to the parent state, but though much that is said in the book before us has been better and more fully set out by Mr. Todd, there are several matters of much practical interest to lawyers to be found in it. We refer especially to the collection of cases which are referred to firstly in the chapters which compose the body of the work and again in the Topical Index which is a compendious guide to the volumes of the Privy Council reports so far as they are concerned with the various dependencies of the British crown. Additional elements of usefulness are a chapter containing the Imperial Statutes relating to the colonies, table of cases, topics of English law dealt with in these cases, etc.

FLOTSAM AND JETSAM.

The following is a verbatim extract from a report of a wife-beating case in one of the London police courts the other day:—John Smith, witness for prosecution, is under examination, "Now, what do you know of the matter, Mr. Smith?" "I know everything. I seed Brown beat his wife." "How did he beat her?" was the text of the question put by the magistrate. "How did he beat her?" exclaimed the witness with a look of scorn, "How would you beat your wife?" This to the worthy magistrate, who desired the witness to answer the question. "Well," at length said the witness. "Brown uses his boots, as I never do. I only uses my fists. I have often told him those here boots would get him into trouble." The worthy Smith was immediately turned out of the court by order of the magistrate.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1882.

During this term the following gentlemen were called to the Bar, namely :—

Messrs. John Donald Cameron and Charles Walker Oliver, with honors; and Messrs. John Campbel, Ferrie Bown, Charles Joseph Leonard, Ernest Edward Kittson, Victor Alexander Robertson, Loftus Edwin Dancy, J. Hamilton Ingersoll, Henry Walter Hall, Robert Abercrombie Pringle, John Calvin Alguire, Frederick, Augustus Knapp, John A. Robinson and James Martin Ashton.

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Spencer Love Francis Robert Latchford, John Alfred McAndrew, Henry Walter Mickle, Alfred Mitchell Lafferty, Charles True Glass, Arthur Eugene O'Meara, Angus McMurchy, Edward George Graham, Robert Hall Pringle, Smith Curtis, Willoughby Staples Brewster, John Frederick Grierson, Edward Kirwan C. Martin John Shilton, Christopher Robinson Boulton, Fenwick Williams Creelman, William Hume Blake, Francis Wolferstan Goodhue Thomas, William Morris, Alexander Clive Morris, David Fasken, James Baird, Frederick C. Wade, Geo. Sandfield Macdonald, George Goldwin Smith Lindsay, Alfred Herman Gross.

Matriculants—Joseph Stockwell Walker, George Ira Cochrane, D'Arcy DeLessart Grierson, Edward James Barrow Duncan, Francis Hall, John Franklin Wills, Henry Parker Thomas, William Francis Johnston, Thomas Atkins Wardell, William Howard Hearst, Norman McDonald, W. J. Millican, John McKay, Robert C. LeVisconte.

Juniors—Herbert Alfred Percival, John Healy Reeves, James S. Chalk, John Henry Alfred Beattie, Wesley Byron Lawson, Henry Newbolt Roberts, Frank Foley Lemieux, James Percy Moore, James Herbert Sinclair, George Herbert Dawson, Neil McCrimmon, John Young Murdoch, Gordon Joseph Leggatt, George Henry Hutchison, George Luther Lennox, Richard Alexander Bayley, Edward Albert Crease, Joseph H. Jack, John Williams Bennett, Malcolm McLean, William George Burns.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Country Churchyard.
The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1883 / 1885	Emile de Bonnechose, Lazare Hoche.	1882 / 1884	Souvestre, Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1882, the following books and subjects will be examined on :

FIRST INTERMEDIATE.

William's Real Property; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills ; Snell's Equity ; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada ; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles ; Taylor's Equity Jurisprudence ; Hawkin's on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV. ; Dart on Vendors and Purchasers; Best on Evidence ; Byles on Bills ; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday after 21st August.
Michælmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the second Tuesday before Hilary, Easter, Trinity and Michælmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the second Thursday before these Terms.

The First Intermediate and Solicitor Examinations will begin on the Tuesday before Term at 9 a.m.

The Second Intermediate and the Barristers Examinations will begin on the Thursday before Term at 9 a.m.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Bencher during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
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DIARY FOR DECEMBER.

3. Sun... *Advent Sunday.*
4. Mon.. Armour, J., sworn in Q.B., 1877.
5. Tue .. County Court sittings begin.
6. Wed.. Rebellion in Canada, 1837.
9. Sat. .. Michaelmas Sittings end.
10. Sun... *2nd Sunday in Advent.*
11. Mon.. Blake, V.C., sworn in, 1872.
12. Tue .. County Court Sittings (except York) begin.
15. Fri. .. Morrison, J., sworn in Court of Appeal, 1877. Christmas vac. in Supreme Ct. and Exch. Ct. begins.

TORONTO, DEC. 1, 1882.

WE regret to say, both for his own sake and for that of our readers, that the gentleman who has hitherto prepared, with so much care and success, the "Recent Decisions" and "Notes of English Practice Cases" for this journal, has been seriously ill for some time, thus causing a temporary breack in the series. We trust, however, that he will soon be able to take up the thread of his narrative again.

THE "act of God or the Queen's enemies" is supposed to cover a multitude of difficulties. It has recently been held by the Supreme Court of California in *De Thomas* v. *Witherby*, (Central L. J., Oct. 20), that when property which has been wrongfully replevied is destroyed by act of God, such destruction will not relieve the liability of the wrong-taker. The point was in doubt in the American Courts, but this decision will doubtless be accepted as final, being founded on reason and justice.

THE conveyancing shoe is beginning to pinch in England. Since Lord Cairns' Act, which has reduced the length of conveyances, clients seem occasionally to have been staring at the continued length of their bills, being under the impression that the latter should be curtailed as well as the former. And worse than that, in country places it is said that this business is falling into the hands of accountants, and such like. A correspondent of a cotemporary says, "We have to pay for renewal certificates, like auctioneers—£6 for a country solicitor, £10 for the other. We are without the slightest protection—the auctioneer fully so. It may not be hard for large offices; but country solicitors, of small practice, complain bitterly."

MORE than a year ago (ante vol. 17, p. 201) we did not scruple to denounce the legislation which has come before the Courts in the *cause celebre* of *McLaren* v. *Caldwell*. The Supreme Court, which has just upset the majority judgment of the Court of Appeal, was so impressed with the iniquity of the measure, as to say that it was not possible to attribute to the Legislature an intention so "unreasonable and unjust," and, giving that body credit for a desire to do justice, decided that it never intended, and therefore had not in law interfered with the enjoyment of Mr. McLaren's rights as a private citizen. The Court was unanimous, and it is to be hoped, for the credit of the country, that there will be an end of a very questionable piece of legislation; and those that were concerned in it should thank the Supreme Court for thus giving them a loop-hole to creep out of.

A COTEMPORARY in the United States says: "In a composite form of government like ours, a certain amount of friction must inevitably be generated by the workings of the

Federal and State systems, and no point of contact has been more fruitful of discord than the government and regulation of the great transportation companies, which, as agencies of commerce, are one of the striking features of the age."

These remarks are peculiarly striking, in view of the present agitation in Manitoba, in reference to the disallowance of railway charters by the Dominion Government. To a lawyer it seems almost impossible to see more than one side to this question. In its present position it is a mere matter of contract between the public and the Railway Company, and the position of the latter seems unassailable. The duty of those who happen to be charged with conducting the public business, is simply to carry out the bargain under which the work was begun and liabilities incurred, until such time as the legal position of the parties may be changed, either by mutual agreement or by constitutional legislation.

BILLS OF LADING.

POLLARD *v.* VINTEN.

OUR valued contemporary, *The English Law Magazine*, remarks, in its last number, that at the forthcoming Tenth Conference of the Association for the Reform and Codification of the Law of Nations, at Liverpool, the subject of Bills of Lading was expected to form one of the prominent topics of discussion, and reproduces at full length the judgment of the Supreme Court of the United States, in a recent case of *Pollard* v. *Vinten*, reported in the *Virginia Law Journal* for June, in which Mr. Justice Miller, in delivering the opinion of the Court, was led to enter at some detail into the analysis of the character and effects of a Bill of Lading. The point actually decided was that an agent of a ship owner, with authority to execute and deliver Bills of Lading, has no authority, nor does it come within the scope of his employment, to deliver such Bills so as to bind his principal, unless the goods comprised have been actually received on board; and consequently, one who had advanced money in good faith on a Bill of Lading received from such an agent, the goods comprised in which had never been taken on board, and consequently never delivered by the ship owner, was held not to be entitled to recover against such ship owner for such non-delivery, although the Bill, as usual, contained a receipt for the goods. A previous decision (*Schooner Freeman* v. *Buckingham*, 18 How. 182,) to the same effect is cited.

On the general subject of Bills of Lading, apart from the question as to agency involved in this case, the judgment enumerates the following propositions:—

"A Bill of Lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hand of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all enquiry into the transaction in which it originated because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or to deliver."

POLICEMEN AND THEIR DUTIES.

Mr. Justice Hawkins has recently written an address to police constables, which will be found as a prefix to Mr. Howard Vincent's "Police Guide." It is so excellent in itself, and comes from such a high authority that we make no apology for inserting it at length. Mr. Justice Hawkins has had a larger experience of criminal law, and therefore of the rights and wrongs of policemen, than most judges. He says :—

"In the few words I purpose addressing to you it is not my intention to define every duty of a police constable, but rather to point out some matters that all who desire to become good officers ought constantly to bear in mind; for, by strict attention to them, every man may assuredly raise himself to a high position in the force; and, by neglect of them, he is equally sure always to occupy a low one. First of all let me impress upon you the necessity of absolute obedience to all who are placed in authority over you, and rigid observance of regulations made for your general conduct. Such obedience and observance I regard as essential to the existence of a police force. Obey every order given to you by your superior officer without for a moment questioning the propriety of it. You are not responsible for the order, but for obedience. In yielding obedience let the humblest member of the force feel that, by good conduct and cheerful submission, he may himself rise to be placed in authority to give those orders he is now called on to obey. As to the regulations, a single moment's reflection will teach you that when so many men of different classes and habits are enlisted in one service, some rules applicable to all are necessary for the purpose of ensuring uniformity in discipline, action, conduct, and appearance; therefore it is that there are regulations exacting sobriety, punctuality, and cleanliness, and many other matters to which I need not refer. The slightest disobedience in one begets a bad example to others, and if this bad example is followed by a few, is calculated to disorganize and bring discredit upon the whole body. Let me now say something to each of you as to the mode in which your obligations to the public ought to be performed. Depend upon it, to become a good and efficient officer you must, when on duty, allow nothing but your duty to occupy your thoughts. You must studiously avoid all gossiping. You must not lounge about as though your sole object were to amuse yourself, and kill the hours during which the public has a right to your best services, and during which constant vigilance and attention to what is passing around you is expected from you. It is this gossiping, lounging habit which sometimes gives rise to the observation that a policeman is never to be found when he is most wanted. Moreover, a man who gives way to such a habit never observes with so much accuracy that which occurs before his eyes, as he who makes it his endeavour to fix his attention upon all that is passing about him. This is a habit not difficult to acquire if you are in earnest; and, when once acquired, you will find the cultivation of it a source of pleasure, and the hours of duty much less irksome. I may add, too, that the man who takes no pains to acquire this habit, for want of attention, generally makes a very bad and inaccurate witness. I wish you to feel the importance of a steady constant endeavour, by your vigilance, to prevent crime as much as possible, and not by your negligence tempt persons to commit it; as you do if you fail in attention to your duty. To my mind, the constable who keeps his beat free from crime deserves much more credit than he does who only counts up the number of convictions he has obtained for offences committed within it. It is true the latter makes more show than the former, but the former is the better officer. The great object of the law is to prevent crime; and when many crimes are committed in any particular district one is apt to suspect that there has been something defective in the amount of vigilance exercised over it. Whatever duty you may be called on to perform, keep a curb on your temper. An angry man is as unfit for duty as a drunken one, and incapable of calmly exercising that discretion which a constable is so often called on to exercise. Be civil and listen respectfully to everybody who addresses you; and if occasionally you are remonstrated with for the course you are taking, do not hastily jump to the conclusion, as some constables do, that the person who so remonstrates wishes to obstruct you in the execution of your duty. Beware of being over-zealous or meddlesome. These are dangerous faults. Let your anxiety be to do your duty, but no more. A meddlesome constable, who inter-

feres unnecessarily upon every trifling occasion, stirs up ill-feeling against the force, and does more harm than good, An over-zealous man, who is always thinking of himself, and desiring to call attention to his own activity, is very likely to fall into a habit of exaggeration, which is a fatal fault, as I shall presently show you. Much power is vested in a police constable, and many opportunities are given him to be hard and oppressive, especially to those in his custody. Pray avoid hardness and oppression; be firm, but not brutal; make only discreet use of your powers. If one person wishes to give another into your custody for felony you are not absolutely bound to arrest. You ought to exercise your discretion, having regard to the nature of the crime, the surrounding circumstances, and the condition and character of the accuser and the accused. Be very careful to distinguish between cases of illness and drunkenness. Many very serious errors have been committed for want of care in this respect. Much discussion has on various occasions arisen touching the conduct of the police listening to and repeating statements of accused persons. I will try, therefore, to point out what I think is the proper course for a constable to take with regard to such statements. When a crime has been committed, and you are engaged in endeavouring to discover the author of it, there is no objection to your making enquiries of, or putting questions to, any person from whom you think you can obtain useful information. It is your duty to discover the criminal if you can, and to do this you must make such inquiries; and if in the course of them you should chance to interrogate and to receive answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence, and may be used against him. When, however, a constable has a warrant to arrest, or is about to arrest, a person on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate, nor juryman, can interrogate an accused person, and require him to answer questions tending to criminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man the constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong. It is well also that it should be generally known that if a statement made by an accused person is made under or in consequence of any promise or threat, even though it amounts to absolute confession, it cannot be used against the person making it. There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him. Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, "Keep your eyes and your ears open, and your mouth shut." By silent watchfulness you will hear all you ought to hear. Never act unfairly to a prisoner by coaxing him, by word or conduct, to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely your evidence will be disbelieved. In detailing any conversation with an accused person, be sure to state the whole conversation, from the commencement to the end, in the very words used; and, in narrating facts, state every fact, whether you think it material or not, for you are not the judge of its materiality. Tell, in short, everything; as well that which is in favour of the accused as that which is against him; for your desire and anxiety must be to be fair, assist the innocent, and not convict any man by unfair means, such as suppressing something which may tell in his favour, even though you feel certain of his guilt. Unfairness is sure to bring discredit upon those who are guilty of it. If an accused in a conversation with you states any circumstances which you have the means of inquiring into, you ought, whether those circumstances are in his favour or against him, to make such inquiry, and the witnesses who can prove or disprove the truth of the statement ought to be taken before the magistrate when the prisoner is examined; and if an ac-

cused person desire to call witnesses, the police should assist him to the best of their power. I cannot too strongly recommend every constable, however good he may fancy his memory to be, to write down word for word every syllable of every conversation in which an accused has taken a part, and of every statement made to him by an accused person, and to have that written memorandum with him at the trial. The last but most important duty I would enjoin upon you is, on every occasion, "Speak the truth, the whole truth, and nothing but the truth." Let no consideration, no anxiety to appear of importance in a case, no desire to procure a conviction or an acquittal, no temptation of any sort, induce you ever to swerve one hair's breadth from the truth—the bare, plain, simple truth. Never exaggerate, or in repeating a conversation add a tone or colour to it. Exaggeration is often even more dangerous than direct falsehood, for it is an addition of a false colour to truth; it is something more than the truth; and it is most dangerous, because it is difficult to detect and separate that which is exaggeration from that which is strictly true; and a man who exaggerates is very apt to be led on to say that which he knows to be false. On the other hand, suppress no part of a conversation or statement, nor any tone or action which accompanies it; for everything you suppress is short of the whole truth. Remember always that reliance is of necessity placed in Courts of justice upon the testimony of policemen; and bear constantly in mind that in many cases the fate of an accused man, which means his life or his liberty, depends upon that testimony; and seriously reflect how fearful a thing it is for a man to be convicted and put to death, or condemned in penal servitude or imprisonment, upon false testimony. Remember, also, when you are giving evidence, that you are not the person appointed to determine the guilt or the innocence of a person on his trial, nor have you any right to express an opinion upon the subject. Your duty is a very simple and easy one—namely, to tell the Court all you know. The responsibitity of the verdict, whether it be guilty or not guilty, rests entirely with the jury or the magistrate (if the case is tried in a police Court), and they have a right to expect from you everything within your knowledge to enable them to form a just conclusion. It is right that I should tell you that wilfully to tell a falsehood, or pervert the truth, in a Court of justice, is perjury; and you all know perjury is a crime punishable with seven years' penal servitude, and your own common sense will tell you that when perjury is committed by an officer of justice he deserves and ought to receive a very severe sentence. Resolve, then, on every occasion to tell the plain, unbiassed, unvarnished truth in all things, even though it may for a moment expose you to censure or mortification, or defeat the object or expectations of those by whom you are called as a witness. Depend upon it, the censure or mortification will be as nothing compared to the character you will earn for yourself as a truthful, reliable man, whose word can always be implicitly depended upon, and the very mortification you endure will be a useful warning to you to avoid, in the future, the error you have candidly confessed. I could write a great deal more on the subjects I have touched; but then my address to you would be too long for this little work, which is intended for your guide, and wherein you will find your duties upon various occasions more fully defined. I have only endeavoured, in a few friendly sentences, to point out to you a line of conduct, the steady adoption of which will enable every man in the police service to feel that he is on the high road to all that he can desire, having regard to the important and very responsible calling he has selected for himself."

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

THE PARRY SOUND LUMBERING CO. V. FERRIS ET AL.

The Act respecting water privileges—R. S. O. Cap. 114.

Applicants petitioned to dam back the water of lake some twenty miles distant from their mill so as t improve their water privilege. To do this they would flood over 200 acres of land, overflow a travelled road and, according to the evidence, the effect of the flooding would be to make the neighbourhood of the lake very unhealthy.

Application refused as not being conducive to the public good, R. S. O. cap. 114, sect. 7, and for other reasons set out in the judgment.

The facts of the case and arguments sufficiently appear in the judgment.

T. S. Plumb, for applicants.

H. H. Strathy, for contestants.

PARRY SOUND LUMBERING CO. V. FERRIS ET AL.

ARDAGH, CO. J.—This is an application under the above statute to acquire portions of the lands of certain parties residing on the shores of Lake Lorimer, in the District of Parry Sound. The applicants have large saw-mills at the mouth of the Seguin River, into which river the waters of Lake Lorimer eventually discharge after passing through and forming a creek called Still Creek, and two smaller lakes. The object of the applicants is to store up a supply of water in Lorimer Lake, tnrning it into a large reservoir, by erecting a dam where Still Creek leaves the lake. Indeed, the dam has already been erected, and raises the water to about the height of eight feet above the level of the lake, thus flooding the lands of those parties who reside on the shores. The surplus water it is proposed to use as occasion requires, whenever the natural flow of the Seguin River may prove insufficient for the working of applicants' saw-mills.

Out of some thirteen persons affected by this flooding, the applicants have obtained grants of the right to flood from ten; of the remaining three (who are made defendants in this application) one of them, Mr. John Bell, is a resident of the United States, and does not appear to have had any notice of these proceedings. The other two, Francis B. Ferris and Edward Bell, appear and oppose the application.

Viva voce evidence has been taken on both sides, the necessary formalities and preliminary steps required by section four of the Act appear to have been regularly complied with and taken by the applicants. The maps filed show clearly what amount of land is required to be submerged—some 200 or 300 acres altogether. But of this only a comparatively small portion belongs to Ferris and Bell, some 20 acres or thereabouts.

The reasons for making this application are thus stated by Mr. David Beatty, a surveyor, called by the applicants. In his evidence he says:—"The company manufacture lumber, having a mill on the Georgian bay. Lake Lorimer communicates with the Georgian Bay. It is an offshoot of Seguin River, and would be a sort of reservoir in dry seasons; this would increase the lumbering facilities, and would be likely to prevent the necessity of shutting down the mill. The company does a large business, and employ 150 to 200 men, some of whom are thrown out of employment when the mill shuts down. This industry benefits the country about there. I speak from experince; it circulates money, and working men are able to find employment and live in Parry Sound. There are scores of men who would not be in that country, nor could live in it, but for the lumbering industry."

Another witness, David S. Miller, says:—"The P. S. L. Company have large works at Parry Sound; they benefit the country by affording a better market for produce; they were shut down last summer for want of water, as I was told, which prevented less money from being in circulation. (He evidently intended to say 'more money.') Raising this lake would keep up the supply."

The next witness called, Thomas McGown, says:—"The Company's power is supplied by the Seguin River, of which Lorimer Lake is a tributary. The company has been a benefit to the country. Farmers get a good price for all they raise. They employ 150 men. To keep a head of water up in this lake would be an assistance. They have spent a good deal of money in building reservoirs. Lack of water and some trouble with the Guelph Company caused a stoppage of water last fall."

Upon this evidence it is argued by Mr. Plumb, for the applicants, that I ought to make the order mentioned in sect. 7 of the Act. That sect. reads, "If such judge is of opinion that the allowance of such application will conduce to the public good, and is proper and just under all the circumstances of the case, he shall make an order describing the lands affected thereby, and empowering such persons to exercise the said powers or such of them as he may deem expedient, for such time and for such terms and conditions as he may determine."

At the close of the "plaintiffs" case, Mr. Strathy, for the defendants, took several objections. (1) That the Act never contemplated making a reservoir of this sort 20 miles away. (2) That these being free grant lands the wives of these "defendants" ought to be made parties, inasmuch as under the Free Grant Act (R. S. O. chap. 24), the wife of a grantee or locatee is entitled, on his death, to the same right or interest that he had, and, by sect. 15, every such wife must be one of the grantors in any deed of alienation by her husband to render the same valid. (3) That as to Bell's land, for which no patent has yet issued, the owner cannot be com-

pelled to make a deed of it. See sect. 10 of said chap. 24.

As to the first objection I shall deal with it by and by, only remarking here that the distance of this lake (Lorimer) from the company's mills was stated by Mr. Plumb to be only about 16 miles, though no positive evidence was given of the exact distance. As to the second objection, I think the wives are not necessary parties; they have no vested interest in the lands, only a contingent one; their husbands are the actual "owners and occupiers" of the lands. Suffice it to say that I think the wives of the defendants, and also any other persons, though not named in the record, might have appeared at the hearing and opposed the granting of the application. Whatever may be the interest of the wives, notice to the husbands must, I think, under the circumstances, be held sufficient notice to them.

It seems to me, too, that the conveyance to be made under sect. 10 being compulsory, and made under the order of the judge, can hardly be called an alienation such as is intended by sect. 15 of chap. 24, R. S. O. If it were necessary that the wife should join in such conveyance there is sufficient authority impliedly given by the Act to compel her to execute it, though if this were not quite clear the proper thing to do to preserve the right of the wife would be to limit the time for the exercise of the powers asked for by the applicants to the life-time of the husband, and no longer, unless, indeed, the wife had predeceased him; this sect. 7 of the Act would authorize. The only difficulty in such a case would be the quantum of damages to be allowed. As to the third objection, as it is only of his "rights" that Bell would be required to make a conveyance, there need be no difficulty on that head.

I now proceed to notice the evidence offered in opposition to the application so far as it relates to the point we are now considering, namely, whether the allowance of it will conduce to the public good, that is, how far such allowance will affect the rights and well being of others, for I think the expression, "public good," is one that is not always an abstract one. There may be times when a case of "public good" is made out so absolutely and completely that the question of the rights of others being interfered with cannot be inquired into. These rights must give way, and the only point then to be determined is that of the amount of the compensation to be paid; on the other hand there will arise a case where the "public good" is not so clearly established, and then it may be only right and proper to enquire what is the extent of the injury or damage arising from the exercise of such a right, as well as the public benefit derived from it, in order to determine the whole question, and have the expression "public good" as a relative one.

This question may be further considered presently when we have looked at the evidence as to the injury likely to ensue from the allowance of this application as well as the good to be gained by the public.

Francis B. Ferris, called to oppose application, says:—"It is healthy around this lake, (Lorimer), and there are lots of fish in it. The frost has not the same effect on crops grown around the lake as on those further off. The effect of granting this application will be that I will have to leave my house. Last year the water came up to the inner line (the witness is referring to the map showing the water line of the proposed flooding, and also the line to which he is referring) and affected my health, as the water created a stench when the hot sun came out. My family all suffered. I was feverish and could not work. I believe it was the effect of the malaria. I suffered this way once before when there was a dam lower down. Never suffered otherwise. The water comes within 28 feet of my dwelling house. I have a spring in my cellar, and it would flood the cellar if the water came to that height. The water touches the out-buildings, though a manure heap prevented it doing so when Mr. Beatty was there and it will flood the floor of it. I could not nor would I live there if the land is flooded, as the effect is to render it very unhealthy. I have seven children and a wife. There is no other Government land to be got like this. I know Bell's property. The water will come within 30 feet of his house. I believe malaria will arise on his place too. I don't think he could live elsewhere on the lot. The flooding prevents his draining a meadow, five or six acres of low ground. There is a lake at the back of his lot, also raised, and so I think he could not safely live between them. The same applies to my lot. I use to go by Still Creek to McKellar mills, with a boat 18 feet long. It averages two rods wide. Some parts are very deep, some shallow.

The channel is very deep. The settlers here all use it for the same purpose with the same sized boats. The dam prevents us using it now. Submerging 200 to 300 acres of land around the lake is destroying the settlement, and the settlers are leaving. The water will submerge the public road and prevent travel. We would have a school section but the settlers are being driven away. Six settlers have been driven away since the dam was built (names given) who would have been in our section. I have brought affidavits from other settlers objecting to this flooding." (I refuse to allow these affidavits to be read). On cross-examination the witness said:—"Before the dam was built the receding water left the ground wet, which dried at once. I don't consider this a public improvement. The company use steam as well as water."

Edward Bell's evidence on the same point is as follows:—"I agree with what Mr. Ferris says that Still Creek is navigable in mid channel. I have used it for going to McKellar mill, where there is a village with stores. There is a portage at Patterson's Falls, (on the way to McKellar village). People have taken logs past McKellar to Seguin River. Flooding the land round the lake is likely to make it unhealthy. Last year, during the flooding, my wife complained of sickness, arising from the stench of the lake. She had not been sick before. She was sick about two months. It began in August. We attributed the illness to the flooding, and I do so still. If the dam is kept there it renders my place unfit for a residence. It raises the water so high that I cannot cross it by a small bridge. I have crossed this bridge for four years without objection. The creek is not in my land. It would give me a mile or a mile and a quarter more to get to the high road. I could not live there, the water being stagnant. I have no other desirable place to build on, it is all bush. There is another small lake touching on the other side of my land. It will not be for the public good to leave this dam. Since it was erected five or six settlers have gone away (names given). I knew them all. I don't know of any one having gone away before that. Those that remain cannot now support a school section. We could have done so before those went away. I believe the cross-way of the public road will be put under water." On cross-examination the witness said:—"I can't say why those people actually left. There are five other settlers round the lake besides the six that have gone, and us two."

In rebuttal, Mr. Beatty was recalled and gave some explanation as to why some of the settlers went away. This is all the evidence given on the question as to this dam being for the public good.

On the argument neither counsel referred me to any cases or text books bearing on this subject, stating what I find, so far as my researches go, to be a fact, that there are no cases on the point to be found in our own reports. I am therefore driven to examine into the law and the cases to be found in American books, for statutes somewhat similar to the one we are now considering have been in force for a long time in several of the neighbouring States. As this case is, so far as I am aware, the first under this Act that has been brought to an actual trial upon evidence, and as it may be useful, on whatever way it eventually terminates, as a precedent in similar application, I feel bound to trace the foundation and history of such legislation as has produced the Act in question.

The legislature have thought fit to exercise the right of "eminent domain" in such matters as railways, which are, undoubtedly, for the public benefit; and have enacted that any lands may be taken which are required for such a purpose, without any possible objection or demur on the part of the owner; the only question to be settled by the Courts, if the owner and company cannot agree, being that of compensation for the lands required and taken.

Under the "Act respecting water privileges," however, the case is different. Here the legislature only says that the right of taking another man's property *may be* exercised provided the judge is of opinion that the allowance of the application to exercise such right "will conduce to the public good, and is proper and just under all the circumstances of the case." I am, therefore, somewhat in the position of a member of a legislature which has been called upon to pass an Act empowering the company to carry out their purpose. As such I will consider the question, and state my reasons for the conclusion I may come to. Upon the right of eminent domain, or the right which the Government retains over the estates of individuals to appropriate them to public use, Vatel says:—"To this

power men have impliedly yielded, though it has not been expressly reserved."—(Chap. 20, s. 34.) Bynkershoek (*lib.* 2. chap. 15,) says:—"This eminent domain may be lawfully exercised whenever public necessity or public utility requires it, and this law seems to be universally recognized."

In Blackstone we read, (Vol. 1., p. 139,) "So great is the regard of the law for private property that it will not authorize the least violation of it, no, not even for the general good of the whole community. . . If a new road were to be made through the grounds of a private person it might perhaps be extensively beneficial to the public, but the law permits no man or set of men to do this without the consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even public tribunals, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights as modelled by the municipal law. In this and in similar cases the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce . . . by obliging the owner to alienate his possessions for a reasonable price, and even this is an extension of power which the legislature indulges with caution."

In Angell on Water Courses, sect. 457, the following language is used: "It is obvious that the government of no state can administer its public affairs in the most beneficial manner to the community at large, if it cannot, on particular emergencies and for public utility, exercise at least a qualified power of disposing of or impairing in value the property of an individual citizen." And in sect. 459 we read:—"It is now considered in England that the true principle applicable to all such cases is that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a *public object* of adequate importance, and that the interference is one of an extraordinary character."

"The extraordinary power with which railway companies and other similar companies are invested by parliament are given to them 'in consideration of a benefit which, notwithstanding all other sacrifices, is, on the whole, hoped to be obtained by the public.' And that since the public interest is to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by such Acts necessarily occasions, they must always be carefully looked to, and must not be extended for other than the legislature has provided, or than is necessary and properly required for the purposes which it has sanctioned."—Per Lord Langdale, in *Coleman* v. *E. Co.'s*, *R. W. Co* 16 L. J. (Chan.) 78.

It has been held in *Manser* v. *N. & E. Co.*, *R. W. Co.*, 2 Rail. cases; and in *Agar* v. *Regents Canal Co.*, Coop. C. C. 77, "That if railway companies in England, in carrying on their works, do more damage than the necessity of the case requires, the Court of Chancery will restrain them by injunction."

While then formerly the maxim "*salus populi suprema lex*," was the ground for interference with the "sacred private rights" of the subject, where such interference is, to use the words of Mr. Broom, "obviously dictated and justified *summa necessitate*," yet, to quote from the same writer "The general maxim applies likewise to cases of more ordinary occurrence in which the legislature of *publicam utilitatem* disturbs the possession or restricts the enjoyment of the property of individuals."

As a legislator then I would find ample warrant under the general law for considering the advisability of granting the powers here asked for if they are of *publicam utilitatem*. In this case, however, the legislature has thought fit to qualify the absoluteness of this language, for the seventh section says:—"If the allowance of such application will conduce to the public good, *and is proper and just under all the circumstances of the case*." Here another element is introduced, one which is to govern in arriving at a correct decision. I can well understand the legislature adding this clause in view of the extremely large and ample powers which seem to be contemplated in the first section of the Act. I must consider then first, whether the granting the powers asked for will conduce *ad utilitatem publicam*, or "to the public good," and on the threshold of this enquiry, or rather prior to entering upon it, is the consideration of the objection raised at the hearing that the statute does not contemplate the making of the dam in question at such a long distance, some 20 miles, above the mills of the applicant.

The only case I can find bearing directly on this point is an American one, *Woolcot Manufacturing Co.* v. *Upham*, 5 Pick. (Mass.) R., mentioned in section 489 of Angell on Water Courses. It is there quoted thus :—"The reservoir for the use of the mill was erected more than three miles from the pond at which the mill was situated ; and it was held that the owner of the land lying between the two dams, which was overflowed by the water from the reservoir, must apply for damages in the mode provided by the statute. The Court thought it very common that two or more ponds were required for a mill, though they were not often so remote from each other as in this instance." From this it would appear that the distance of three miles between the mill and the reservoir was an unusual one. On this question of "public use" Angell says, (sect. 466,) "As a general rule it must undoubtedly rest in the discretion and wisdom of the legislature to determine when public uses require the assumption and appropriation of private property. Although the question is one not without embarrassment, as the line of demarcation between a use that is public and one that is strictly private is not to be drawn without much consideration." And the writer quotes the opinion of Shaw, C.J., in the case of the *Boston Water Power Co.* v. *Boston and Worcester Ry. Co.*, 23 Pick. (Mass.) R. 360, where he is reported as saying :—"It is difficult, perhaps impossible, to lay down any general rules that would precisely define the power of the government in the exercise of the acknowledged right of eminent domain ; it must be large and liberal so as to meet public exigencies, and it must be so limited and restrained as to secure effectually the rights of the citizen ; and it must depend in some instances upon the nature of the exigencies as they arise, and the circumstances of particular cases." And the writer adds, "One thing is incontrovertible, and that is, that the necessities of the public for the use to which the property is to be appropriated must exist as *the basis* upon which the right is founded." And in sect. 467, "Although it rests with the wisdom of the legislature to determine what is a 'public use,' and also the necessity for taking the property of an individual for that purpose, yet the right of eminent domain does not authorize the government, even for a full compensation, *to take the property of one citizen and transfer it to another* when the public is not interested in the transfer."

And here I would give expression to a certain state of doubt I am in as to the full intent and meaning of our own Act. The first section contemplates the entering of one person upon the lands of another for acquiring certain rights and privileges which are manifestly of a *private* nature ; while in the seventh section reference is specially made to the necessity of those rights and privileges being "for the public good."

The Act has been passed since the case of *Dickson* v. *Burnham*, 14 Grant, 594, where Mowat, (then V.C.,) says :—"This right of private property is made by parliament to give way, on proper terms, and with proper precaution, in order to enable railways and canals to be built, and other objects of general utility to be accomplised. And I see no reason why the legislature should not, on the same principle, make some provision of a like kind to encourage the building of mills and manufactories. Laws for this purpose were passed in several of the neighbouring Ssates when they were colonies of Great Britain, and still exist in them." On reference to those laws, as passed in the States of Maine and Massachusetts, I find no such limitation as that contained in our Act in reference to the "public good." And this ought to be borne in mind in considering any of the American cases that are made use of. I quote again from Angell, s. 487, "An opinion has been entertained by some persons that the enactment of the above statutes (*i. e.*, such as have already been referred to,) is an abuse of the right of eminent domain . . . though mills might, with propriety, have been considered public easements, and as of public convenience and necessity in the first settlement of the country."

The late Chief Justice Parker of Massachusetts, speaking of the statutory law of that State at that time, which re-enacted the old provincial Act, prior to the Revolution, says in the case of *Stowell* v. *Flagg*, 11 Mass. R. 364, "We cannot help thinking that this statute was *incautiously* copied from the ancient colonial and provincial Acts, which were passed when the use of mills, from the necessity for them, bore a much greater value compared to the land used for the purposes of agriculture, than at present." Upon this Mr. Angell remarks, "The real question is, whether authorizing the flowing of another's land is sufficiently for the public good to justify depriving the owner of the use of it, even for a

just compensation." The foundation and *raison d'etre*, so to speak, of all these American statutes seems to be the necessity of mills for the public benefit. The old Massachusetts statutes speak of mills as greatly beneficial to the public; and the preamble of Provincial Statute 12 Am. c. 1, "An Act for upholding and regulating mills," recites that they sometimes fall into disrepair and are rendered useless and unserviceable, if not totally demolished, *to the hurt and detriment* of the public. Chap. 8 of same year speaks of "mills serviceable to the public good and the benefit of the town." In the case of *Beekman* v. *Saratoga and Schenectady Ry. Co.*, 3 Paige (N.Y.) 73, Chancellor Walworth, speaking of the right of eminent domain, says that it has been upon this principle that the Legislatures of the several States have authorized the condemnation of lands of individuals for mill sites where, from the nature of the country, such mill sites would not be established for the accommodation of the inhabitants, without overflowing lands thus condemned.

In 2 Am. Jurist, art. II., the support of grist-mills and saw mills is said to have been, in those early days, a measure of vital necessity. And they were consequently encouraged in every possible manner.

If the "accommodation of the inhabitants," then, be another form of the expression "public good," let us see how far it will throw light upon this case.

The chief point in Mr. Plumb's argument, and that to which most of his evidence was directed, was that the Parry Sound Mill Co. gave employment to a great number of men, who would otherwise not be in that part of the country at all, and that thus a good market for their produce was afforded to the farmers around. Now it seems to me, this is a very indirect way of shewing the "public good" of this mill. It is not shown that the mill itself, *qua* mill, is of any benefit to the public around there, in the same way that the mills spoken of in the American cases referred to were, namely, by supplying flour and lumber to the settlers around, and which were spoken of as being a "vital necessity."

This mill last season, it was shown, manufactured some 15,000,000 feet of lumber. How much of this was required for the use of the "public" about Parry Sound, where there is also another large saw mill? Would the total stoppage of this mill occasion any injury, or even inconvenience, to the people about? that is, so far as the manufactures of the mill are concerned. True, they are beneficial by the employment of a large number of men; but the same result would be obtained by almost any branch of industry which called for the use of manual labour to a large extent. And this result is constantly obtained now-a-days by the holding out of a bonus by a town or village to any one establishing a manufactory on a large scale.

Supposing, however, it be assumed that this mill is for the good of the public about Parry Sound without this reservoir, and still more so if the reservoir be established, what shall be said about the "public good" to a settlement some 20 miles distant? If the employment of a large number of men at Parry Sound benefits the public there, how far does it benefit the public about Lorimer Lake? They, it was shown, have several saw-mills sufficient for their wants about a quarter of the distance off that Parry Sound is.

The effect of this flooding upon the health of some of the residents has already been shown. True we have only the evidence of two of them, but if one of the other ten riparian proprietors were called—those opposing this application, stating that they had not the means of bringing any witnesses other than themselves the long distance of some 120 miles, (of these ten, too, some six had left for some cause or other since the raising of the dam)—we might reasonably have some doubt as to their having been benefited by it.

On the subject of the malarial sickness spoken of in the evidence, I find that in the Act of Florida when a mill owner wishes to overflow his neighbours land for mill purposes he obtains a writ of *ad quod damnum*, commanding the sheriff to summon twelve householders to examine the land. "But in no case is the writ to be granted if the jury, in their report, state that the injury likely to result to the neighbourhood from the erection of the dam, by sickness or otherwise, will be greater than the benefit to be derived from the same."—(Thompson's Digest of Laws of Florida, 401-402). Under that statute clearly this application cannot be granted, for the benefit to the neighbourhood is not even suggested, while the sickness spoken of, as well

as the injury to the fish, the obstruction by the dam to the use of boats going to MeKellar village, the flooding of Ferris' stable and the cellar of the house, and the overflowing of the public highway, seem far to outweigh any possible benefit that can be conceived.

The statute of Virginia goes even further, for, by sect. 5, "If on one such inquest, or on any other evidence, it shall appear to the Court that the mansion house of any proprietor, or the office, curtilage or garden thereto immediately belonging, or orchards will be overflowed, or the health of the neighbours be annoyed, they shall not give leave to erect the said dam."

Mr. Ferris evidently would be perfectly safe if he lived in Virginia. Now if I ask myself the question, whether the allowance of this application will conduce to the public good, and is proper and just under all the circumstances of the case? I cannot, when I look at all these circumstances, with a good conscience, answer in the affirmative. *The good* to be derived from it would, it seems to me, result more to the private benefit of this company than to that of the public in the neighbourhood of Parry Sound. And much more to them than to the public at Lorimer Lake.

It was not shown that the mill could not be worked without this additional water power, or that the ordinary supply of water ever failed. The most that was said was, that last summer (one of the driest we have had for many years) the mill had to stop for a while owing to the lack of water, and to some difficulty with the Guelph Lumber Company. I cannot see how a temporary failure of water, even every year, would be any inconvenience, still less an injury to this company, inasmuch as they use steam in addition to their water power—being already provided with the necessary works and machinery for the purpose of using steam. It is not as though they had to go to the expense of now doing so. It may be unfortunate for the company that they have already erected the dam, at some considerable expense no doubt; in doing so, however, they exceded their powers. The only right given them by the Act before this application was to enter upon the lands required, to examine and survey them afterwards, if their application was granted they must have paid in the assessed damages before they would be entitled to a conveyance of the land, or to exercise any of the powers mentioned in the first section of the Act.

I have not thought it necessary to say anything as to the objection raised, that Still Creek was a navigable river, as my judgment proceeds upon other grounds. No doubt, in the technical sense of the word, it is not a navigable stream, as it is not affected by the ebb or flow of the tide. But it might be said to be a boatable one. The common law has preserved the right to the public, as a highway, such rivers above the flow of tide water as are naturally of sufficient depth for valuable floatage, giving them an easement therein for the purposes of transport and commercial intercourse. The Thames, the Severn and the Wye are instances of this. In the State of Maine, where the English common law prevails, it seems that if a stream is naturally of sufficient size to float boats or mill logs, the public have a right to its free use, for these two purposes, unencumbered with dams, etc. (*Wadsworth* v. *Smith*, 11 Maine 278).

Taking the view I do, it is unnecessary to make any reference to the subject of compensation. I find, however, a case in our Courts where the decision of the Court was, that when land is overflowed by the erection of a mill, the owner may recover full compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it effect his domain in the land by taking away its use, or impair the value of that domain by rendering the land unfit for a place of residence, or whether the injury—reaching beyond its immediate mischief—extends also to the personal property of the petitioners.

This application will therefore be refused, with costs to the defendants Ferris and Edward Bell, to be paid by the plaintiffs, the Parry Sound Lumber Company.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

FORRISTAL ET AL V. MCDONALD.

Supreme and Exchequer Court Act, sec. 31—Supreme and Exchequer Court Amendment Act, 1879, sec. 14—The Judicature Act of Ontario, sec. 43—Motion for leave to appeal to Supreme Court refused by Court of Appeal for Ontario—Subsequent motion to Supreme Court for leave to give proper security in Supreme Court, granted.

On the 15th day of September, 1882, an appeal to the Court of Appeal for Ontario, in which the present appellants (defendants) were appellants, and the present respondent (plaintiff) was respondent, was dismissed. The matter in controversy in the action amounted to the sum of $576.30 exclusive of costs. The present appellants, on said 15th day of September, applied to the Court of Appeal in virtue of sect. 43 of the Judicature Act of Ontario for special leave to appeal from the judgment of said Court of Appeal to the Supreme Court of Canada, and the Court of Appeal refused to grant such special leave. The appellants thereupon made an application to Mr. Justice Fournier, in Chambers, for leave to appeal from said judgment of the Court of Appeal in virtue of the same sect. 43 of the Judicature Act for Ontario, or for an order that appellants be at liberty to give proper security to the satisfaction of the Supreme Court, or a judge thereof, that they will effectually prosecute their appeal, or such further or other order as the judge or Court might direct. This application was made on the 4th day of October, 1882, being within thirty days after the said judgment was pronounced. Mr. Justice Fournier, on finding that the question as to whether the section in question of the Judicature Act of Ontario was *ultra vires* of the Legislature of the Province of Ontario had been raised by the application, referred it to the full Court, and on the 7th of November the motion was argued before the full Court.

Gormully, for the appellants.

Maclean, for respondent.

In the course of the argument the Court expressed great doubt as to the constitutionality of the Ontario statute, but as the appellants's counsel abandoned the first alternative of his motion the Court made the following order :—

"Upon motion this day made unto this Court by Mr. Gormully, of counsel for the appellants, for an order for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario, pronounced in this cause on the 15th day of September, 1882, or for an order that the appellants be at liberty to give proper security to the satisfaction of this Court, or a judge thereof, that they will effectually prosecute their appeal, and pay such costs and damages as may be awarded in case the judgment appealed from be affirmed, or for such further or other order as to this Court may seem meet, upon hearing read the affidavit of George Christie Gibbons, filed in support of the said motion, and upon hearing what was alleged by counsel for the said appellants, and also by counsel for the said respondent, and it appearing that this application was originally made to the Hon. Mr. Justice Fournier, in Chambers, on the 4th day of October, 1882, within thirty days after the said judgment was pronounced, and was, by the said Mr. Justice Fournier, referred to this Court, and counsel for the said appellant abandoning the first alternative of the said motion, this Court, exercising the powers conferred by the 14th section of the Supreme and Exchequer Court Act, 1875, as amended by the 14th section of the Supreme Court Amendment Act of 1879, doth order that the second alternative of the said motion be granted, and that the said appellants be at liberty to give the security required by the statute in such case made and provided, that they will effectually prosecute their appeal, and pay such costs and damages as may be awarded in case the judgment appealed from be affirmed by forthwith paying the sum of five hundred dollars ($500) into this Court to the credit of the Registrar thereof, to abide the event of this appeal."

BANK OF BRITISH NORTH AMERICA V. WALKER.

Motion for leave to file a printed case not certified by clerk of Court below—Extension of time to complete and file case granted.

This was a motion for an order granting leave

to file and inscribe an appeal for hearing, notwithstanding that the case had not been certified and transmitted by the clerk of the Supreme Court; or for an order directing a writ of *certiorari* to issue to the clerk of that Court to compel him to send to the Supreme Court of Canada the record and all papers filed in the case.

On the 22nd of June last the Supreme Court of Canada made an order allowing appellants until the 15th of September following to file the case and their *factums*. In default the appeal to stand dismissed without further order. Before the 15th of September the appellants moved before the Chief Justice for leave to proceed with their appeal on a printed case submitted, although such printed case was not duly certified and transmitted by the clerk of the Court below.

The Chief Justice referred the motion to the Court.

Christie, for appellants, contended that it was through no fault of the appellants if the printed case had not been certified, that it had been settled by the Chief Justice of the Supreme Court of British Columbia, and that the appellants had been already obliged to pay a sum of $1,000 to the respondents by order of the Court below, and that the excuse given by the clerk of the Court was that the case as printed was not a *correct* case. If there was any part of the record omitted appellants were willing to have the same added.

McIntyre showed cause, and contended that the *case* had not been finally settled, and that an important part of the evidence, which formed part of the judge's notes at the trial, had been omitted from the case, and that it was now too late for appellants to file their case.

Held, that the appellants should have a further extension of time, viz., till January 1st next, to complete and file their printed case. Respondents to pay $50 costs of the present motion, and $20 costs of the previous motion in Chambers. The Chief Justice stated that if any further obstacles were placed in the way of appellants, this Court would take the necessary means in order to have a speedy hearing of the appeal.

F. X. MAJOR v. CORPORATION OF THE CITY OF THREE RIVERS.

Appeal—Circuit Court (P.Q.,) being a Court of original jurisdiction, judgment from Court of Queen's Bench (P.Q.,) in such a case not appealable to the Supreme Court of Canada.

This was an appeal from a judgment of the Court of Queen's Bench (P.Q.,) whereby the judgment of the Circuit Court at Three Rivers was reversed. The case was settled and agreed to by both parties, and no objection taken to the jurisdiction.

Held, that an appeal will not lie to the Supreme Court of Canada from a final judgment of the Court of Queen's Bench (P.Q.,) in cases in which the Court of original jurisdiction is the Circuit Court for the Province of Quebec.

MacLaren, for appellant.

Denoncourt, for respondents.

Appeal quashed without costs.

BICKFORD v. HOWARD.

Trial by judge without a jury—Plea of set-off to an action on a contract—Verdict for plaintiff—Affirmed by two Courts—Weight of evidence, appeal on.

The appellant appealed from two judgments of the Court of Appeal for Ontario, affirming judgments recovered against him by the respondent in two several actions brought on alleged contracts, to which actions appellant pleaded *inter alia* a plea of set-off. The cases were tried before a judge without a jury, and the respondent obtained two verdicts. These verdicts having been moved against, were sustained by the Courts of Queen's Bench and Common Pleas respectively, and both by the Court of Appeal for Ontario. On appeal to the Supreme Court against the judgment of the Court of Appeal affirming those judgments and verdicts,

Held, that before reversing the verdict of a judge who has tried a case without a jury, and whose verdict has been affirmed by two Courts, this Court, sitting in appeal, will not reverse the conclusion arrived at by the lower Courts on the weight of the evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case has come have clearly erred and that in this case there was no error, and the

verdict in favour of respondent should not be disturbed.

Robinson, Q.C., and *McCarthy*, Q.C., for appellant.

Martin, for respondent.

Appeal dismissed with costs.

[Nov. 28.

BOURGET v. BLANCHARD.

Motion to rescind an order of a Judge of the Court of Queen's Bench, Province of Quebec, in Chambers—Security—Jurisdiction.

This was a motion for leave to appeal from a judgment of the Court of Queen's Bench (appeal side), rendered on the 5th October last, and praying that an order of Mr. Justice Tessier, a judge of said Court, made in Chambers on the 23rd October last, refusing to grant leave to appeal from said judgment, be rescinded, and that the said Judge, or any other Judge of the said Court of Queen's Bench, be ordered to receive security offered by appellant.

Held, that this Court had no jurisdiction to entertain such a motion.

Motion refused with costs.

Turcot for appellant.

Livernois for respondent.

CHANCERY DIVISION.

The Chancellor.] [Nov. 15.

GUEST v. GUEST.

Alimony — Foreign marriage and divorce — Adultery—International law.

The marriage of the plaintiff and defendant took place in the State of New York in 1876, after which they came to reside in Ontario. Thereafter, the husband deserted his wife, and went to the state of Ohio, where he has since been domiciled. He there obtained a decree of divorce, on the ground of adultery of his wife committed in Ontario, after notice of the proceedings had been personally served on the wife and witnesses had been heard on his behalf. The wife now claimed alimony, on the ground of his desertion

Held, that credit should be given to the foreign decree of divorce, which should therefore be acted upon in this Province; for the domicile of the husband was the domicile of the wife, so as to give the Ohio Court jurisdiction. There was no evidence that the divorce proceedings were collusive, or conducted contrary to national justice, and the cause alleged was such as to entitle the party injured to a dissolution of the marital relation wherever Christianity is accepted.

The Chancellor.] [Nov. 22.

MCCARDLE v. MOORE.

Administration—Default of executor—Costs.

The plaintiff being a lunatic, and entitled to maintenance out of the income of a fund in the hands of executors, brought an action for the income; and for administration.

The Master reported a balance of interest in the hands of the executors, which they had not admitted; but the conduct of the executors was otherwise proper.

Held, if the question of the liability of executors for the interest had been the only one in the action, the executors should have been ordered to pay the costs; but inasmuch as a general administration was sought and granted, no costs should be awarded for or against the executors.

The original plaintiff having died pending the action, and an order having been granted to continue the proceedings in the name of an administrator *ad litem*,

Held, that the plaintiff's costs, between solicitor and client, should be paid out of the interest recovered

Held also, that the administrator *ad litem* was not entitled to be paid the residue of the fund; but as to this, liberty to appeal was granted.

J. A. Donovan, solicitor for plaintiff.

Bethune, Moss, Falconbridge & Hoyles, solicitors for defendants.

The Chancellor.] [Nov. 22.

FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO.

Infant—Mortgage—Acquiescence—Confirmation of voidable instrument—Laches—Ratification.

The plaintiff, being an infant, on the 20th February, 1878, executed a mortgage in favour of the defendants. The proceeds were chiefly

applied in paying off prior encumbrances on the lands. The plaintiff came of age, according to his statement of claim, on the 16th March, 1881, but according to the evidence, on the 19th April, 1880. No steps were taken to disaffirm the mortgage until 7th December, 1881, and on the 30th of September, 1882, this action was commenced.

Held, that the mortgage was not void, but only voidable, and that the plaintiff's conduct after he came of age, and after he had full knowledge of his rights, amounted to a ratification of it.

Shaw & Robertson, solicitors for plaintiffs.

Jones Brothers & McKenzie, solicitors for defendants.

The Chancellor] [Nov. 22.

O'CONNOR V. ANDERSON.

Will—Power of sale—Mortgage.

A testator devised and bequeathed all his real and personal estate to his wife for her life, with remainder to his only son. By the will he also gave the wife the right to sell and dispose of all his personal property, she affording a home for all the testator's children till they should attain the age of 18. He then appointed his wife and the plaintiff O'C. his executors, and ended the sentence, "to which I hereby subscribe my lawful signature." Without subscribing his signature, however, at this point, the will proceeded, "P. S. If through sickness or poverty that my wife, Eliza O'Callaghan, is sore embarrassed, and Francis O'Connor thinks it advisable to sell my real estate, she is to have the liberty." After this followed the signature of the testator, and then several testatum clauses. The wife did become embarrassed, and two mortgages were executed by her and O'Connor, for the payment of which O'Connor became personally liable. The proceeds were applied in the maintenance of the wife and her child. The plaintiff O'C. subsequently was compelled to repay the mortgages, and took an assignment thereof to his co-plaintiff in trust for him.

Held, the power of sale authorized a mortgage of the realty.

Held also, that the plaintiff O'C. was entitled to a sale of the lands to indemnify him against the moneys paid the mortgagees, with interest and costs of action.

Wm. Kingston, solicitor, for plaintiff.

Macdonald & Macdonald (Guelph), solicitors for defendant Anderson.

J. Hoskin, Q.C., for infant defendant.

DARLING V. DARLING.

Foreign commission—Return.

A commission was issued to examine witnesses in England, pursuant to Order XXXIII., in the form given in the Schedule to the rules of Court, the 1st of February being named as the return day. Upon application the Master in Ordinary made the following order:—"I extend the time for the return of the commission peremptory to the 24th of February." The witnesses were examined on the 24th February, but the commission and evidence did not reach the Master's office until some time afterwards.

Held, that the effect of the Master's order was to extend the time of return to the 24th of February, up to which time the commissioners had the right to take evidence; and the commission having been executed and posted within that time there was no irregularity, because of the necessary delay occasioned by its transmission from the foreign country.

Held also, that the attendance before the commissioners of all parties, on the 24th February, had the effect of a waiver of any objection that the evidence was not returned to the Master's office by the 24th February.

Ferguson, J.] [Nov. 29, 30.

HUNTER V. WILCOCKSON.

Motion for judgment—Default of appearance—Statement of claim—Endorsement on writ.

Where on default of appearance it is necessary to move for judgment, a statement of claim must be first filed, and the plaintiff cannot, on motion, obtain judgment for the relief claimed in the endorsemunt on the writ without filing a statement of claim.

J. Bain, for plaintiff, moved for judgment for the relief claimed by the endorsement on the writ. The action was for the rectification of a deed and for a declaration that the plaintiff was entitled to a right of way, and for an injunction restraining defendant from interfering therewith. The endorsement stated the relief claimed; the

defendant had not appeared within the time limited, but had subsequently entered an appearance, but had not served any notice of appearance. Notice of the motion had been posted up in the office as in case of non-appearance. This appears to be sufficient under Rules 61, 131.

FERGUSON, J.—The service of the notice of motion seems to be regular under the Rules to which you refer, but is the action ripe for judgment, must there not be a statement of claim filed?

Bain continued—It is not necessary to serve any statement of claim. There is nothing in the Rules making it necessary to do so. Rules 158 and 159 do not provide for the delivery of a statement of claim where a defendant does not appear. He referred also to Rules 5, 11, 159, 315, and *Minton* v. *Metcalfe*, 46 L.J., Chy. 584.

FERGUSON, J., Rule 211 provides that judgment may be given upon a statement of claim, but what authority is there for giving judgment according to the endorsement on a writ except in the special cases provided for by Rules 72-81?

Bain, I do not think there is any express authority; it is to be implied from Rule 315.

Cur. ad. vult.

Nov. 30.—FERGUSON, J.—I am of the opinion that the case is not ripe for judgment, and should not have been set down. The endorsemet is not a "special endorsement" within the meaning of Rules 14 or 15, or any of the Rules under which judgment can be entered by default for want of an appearance, so far as I can see, and I do not find in the Act or Rules any authority for setting the case down on a motion for judgment in its present stage.

I think the plaintiff must either file a statement of claim, or proceed under the provisions of Rule 159. It is not clear, however, that the latter course is open to him, owing to the nature of the matter contained in the so-called "special endorsement." The plaintff, should, I think, file his statement of claim.

The motion will be refused.

PRACTICE CASES.

Mr. Dalton, Q.C.] [Dec. 4, 1881.

HOPKINS v. SMITH.

Costs of day.

The practice of giving costs of the day is superseded by the O. J. A., as, if the plaintiff fails to set the case down, the defendant may do so, and then costs are in the discretion of the judge at the trial.

The Master in Chambers has now no authority to make an order for such costs.

Holman, for motion.

J. H. Macdonald, contra.

Osler, J.] [Nov. 10.

FEE v. MCILHARGEY.

Prohibition—Division Court—New trial.

After judgment in an action in a Division Court of the County of Victoria, the defendant, within the fourteen days required by Div Ct. Act, sec. 107, moved, on notice filed with the clerk of the Court, for a new trial, on the ground of the discovery of fresh evidence, but did not file an affidavit under Division Court rule 142. An affidavit was subsequently filed, the motion heard, and a new trial granted by the County Court judge.

This was a motion for a prohibition, on the ground that the rule, having the effect of a statute, by sec. 241 an omission to observe its requirements was as much a ground of prohibition as if the application itself had been made after time.

OSLER, J.—The general rules of the Division Court, framed by the judges under the authority of the statute, are rules of practice, and it is well settled that the transgression of a mere rule of practice forms no ground for prohibition, at all events, if the court proceeds to sentence or judgment on the particular motion before prohibition is moved for. *Jolly* v. *Baines*, 12 A. & E., 201-9, is precisely in point.

Motion refused with costs.

Aylesworth, for the motion.

T. Hodgins, Q.C., contra.

Boyd, C.] [Nov. 22.

TILT v. KNAPP.

Administration.

The property was sold under a decree of the court.

The conditions of sale were the standing conditions of sale of the court.

The purchaser paid 10% of his purchase money into Court, but made default in paying the balance, and the property, on a resale,

brought twenty-five dollars more than the applicant bid.

An application, by the purchaser, to have his deposit repaid to him on the ground that there had not been any loss to the parties was refused.

Armour, for purchaser.

H. Cassels, for plaintiff.

Hoyles and *Moffat*, for defendant.

J. Hoskin, Q.C., guardian *ad litem*.

Boyd, C.] [Nov. 22.

ROSENSTADT v. ROSENSTADT.

Adultery—General charge—Particulars.

This was an alimony suit. Paragraph 12 of the statement of claim was as follows: "The plaintiff alleges and charges adultery on the part of the defendant as a further ground for relief in the premises."

The Master at Hamilton refused to make an order for particulars.

On appeal,

BOYD, C., ordered that plaintiff give within one month particulars of the acts of adultery intended to be proved under the general charge, and be limited to those at the hearing, and that in default of such particulars no evidence was to be given under the general charge.

Costs of application and appeal to be costs in the cause.

Mackelcan, Q.C., for plaintiff.

H. Cassels for defendant.

Boyd, C.] [Nov. 22.

CHADBOURNE v. CHADBOURNE.

Will—Legal heirs—Mixed devise—43 Vict., c. 14, sec. 2.

A testator left three children, and four grandchildren, the issue of two other of his children who pre-deceased him.

The will was dated 28th April, 1880, and subsequently the testator died. He disposed of the residue of his estate as follows: "I give and bequeath the remainder of my personal and real estate to my legal heirs, including my daughter, Jemima Woodside, to be divided equally amongst them."

On the reference in a partition suit, the Master divided, under this clause, the residue into seven equal parts on a *per capita* principle.

Held, on appeal, that a division *per capita* and not *per stirpes*, was correct.

43 Vict., c. 14, s. 2, which defines the word "heirs" in a devise of "real estate," does not apply, as this is a devise of a "mixed fund" to "legal heirs." Legal heirs means heirs legally born: *Harris* v. *Newton*, 25 W.R. 228.

Costs out of the estate, as the appeal was proper on account of the importance of the question.

Cattanach, for appeal.

J. Hoskin, Q.C., contra.

Boyd, C.] [Nov. 22.

O'DONOHOE v. WHITLEY.

Appeal—Sect. 33, O. J. A.

Certain bills of costs were filed in the Taxing Master's office amounting in all to $250. On taxation they were reduced to $187.

The plaintiff applied for leave to appeal under sect. 33, O. J. A., contending that the matter in controversy exceeded $200.

The Master in Chambers refused leave to appeal to the Court of Appeal under the above section. On appeal,

Held, that the matter in controversy for the Court of Appeal was, whether the appellant (the plaintiff) was liable to pay $187, or anything, as no greater sum than that could, whatever became of the appeal, be recovered against him.

Appeal dismissed with costs.

Howells, for appellant.

Hoyles, contra.

Patterson, J. A.] [Nov. 24.

MCCRAE v. WHITE.

Bond on appeal—Time—Filing.

Judgment was delivered by the Court of Appeal on the 24th March last, and on the same day application was made for leave to appeal, the case being one in which, under O. J. A., leave to appeal was necessary. The application was considered, and leave to appeal granted on 1st May following. The bond was filed on the 22nd May.

Held, by PATTERSON, J.A., after consultation with BURTON, J.A., that the delay being the act of the Court the time for filing the bond must

count from the granting of leave to appeal, as no delay took place in applying for such leave.

J. H. McDonald, for appellant.

Hoyles, contra.

Cameron, J.] [Nov. 27.

CHAPMAN V. SMITH.

Notice of trial—Dismissal of action—Rule 255.

The pleadings in the action had been closed for more than six weeks when the plaintiff entered the case, and gave due notice of trial under Rule 255. By consent, at the assizes, the case was struck off the list by the judge without costs to either party.

Held, by the Master in Chambers on a motion by the defendant, to dismiss, for want of prosecution, under Rule 255, for not setting the cause down for a subsequent assize, that Rule 255 contained, in fact, two directions, 1st, that either party might give notice of trial; 2nd, that either might give such notice for the first assize held ten days after issue joined, and that, as a consequence, from the first direction of the rule, the defendant might move to dismiss for any default of the plaintiff in not setting down and giving notice for any future assize.

Order accordingly.

Held, on appeal, that where a case is struck off the list by the Court in the manner in question, as the old practice of striking out no longer prevails, it is equivalent to a dismissal of the action, and neither party can move in it without the special leave of the Court. That after notice of trial has been given and cause entered, it is not competent to dismiss an action except under Rule 269. That by the giving of notice of trial and the entry of the cause for trial, an action is completely removed from the operation of Rule 255.

Semble, the proper course in the present case was to have applied for a postponement to the next or a future sitting of the Court, or, under Rule 171, producing a written consent to the proper officer of the Court.

Appeal allowed without costs.

Holman, for the appeal.

Watson, contra.

LAW STUDENTS' DEPARTMENT.

LAW STUDENTS' LIBRARY.

To the Editor of the LAW JOURNAL.

DEAR SIR,—The Law Society have provided for the use of students a library consisting of the text books used on the course for the law examinations.

This library consists of about twenty-five text books, and these mostly old editions now of very little use. There are understood to be two copies of each work, one of which must always remain for use in the Hall.

Now, Mr. Editor, there are studying in the City of Toronto alone some three hundred law students, and most of them are endeavouring to get a training in Toronto on account of the additional advantages in the way of practice, and get along as best they can on little or no salary, consequently they cannot, as a general rule, afford to purchase the text books.

Each student pays into this society sums amounting to about forty-three dollars a year during his five years' course, and the Law Society with their large surplus, swollen every three months with the fees of law students, should, we think, have a little more consideration for them, and furnish a library of text books that would be something nearly adequate for their use—say ten or fifteen copies of each work used on the course.

When one copy of a work is being watched for by sixty or seventy students it seldom finds its way back to the Hall if taken out a month or two previous to an examination, until that examination is over, and it is then secured by another student only to be retained by him until he is through with it. Of course it is impossible for the librarian to prevent students taking these books, as he cannot remain and watch the miserable collection in this text book library all the time; but if there were a number of copies of each work supplied the student would then feel satisfied that when he wanted to read a work he would be able to get it, this evil would be done away with.

We do not forget that the society has been good enough to furnish us with a course of lectures, and for this we are truly thankful, still we think this will prove a far less expensive boon and one that would be fully appreciated.

I hope, Mr. Editor, that this grievance will be redressed ere long, and thanking you for publishing this, we are,

Yours truly,

Law Students.

BOOK REVIEW.

Blackstone's Commentaries for the use of students-at-law and the general reader, by Marshall D. Ewell, LL.D., Professor in the Union College of Law, Chicago. Boston: Soule & Bugbee, 1882.

What Mr. Leith has done for the Canadian student in relation to real property, Mr. Ewell has done for the Anglo-Saxon student in connection with this the best known of all text books. So far as we have been able to judge, obsolete and unimportant matter is omitted, the paging of the original has been inserted, and as a rule the exact language of the author retained. The book presents an appearance of compactness and convenience which renders it attractive and less like a dry text book. Masters would do well to encourage their students by the occasional present of some standard text book, and could not do better than begin with Ewell's Blackstone.

The Admiralty Decisions of Sir Wm. Young, Kt., LL.B., Judge of the Court of Vice-Admiralty for the Province of Nova Scotia, and late Chief Justice of the Supreme Court, 1865-1880. Edited by James M. Oxley, LL.B., B.A., Barrister-at-Law, Editor of the "Nova Scotia Decisions." Toronto: Carswell & Co., Law Book Publishers, 1882.

We have received "The Admiralty Decisions" of Sir Wm. Young, Judge of the Court of Vice-Admiralty for the Province of Nova Scotia, and late Chief Justice of the Supreme Court. The volume, one of over 300 pages, contains the decisions of the above judge during a period of fifteen years—from 1865 to 1880. A long felt want by those of the profession practising in the Maritime Court has thus been supplied, and these Reports are sure to be appreciated by them. Sir Wm. Young has been always known as a conscientious and painstaking judge, and a perusal of his judgments now reported will show a vast amount of research, and a great deal of careful preparation by the learned judge.

The compilation of the present volume was undertaken by Mr. Oxley, Barrrister, of Halifax, and editor of "The Nova Scotia Decisions," and "contains," as the preface informs us, "all the judgments of permanent value delivered by Sir Wm. Young, and will be found to embrace decisions upon many of the most important questions of principle and practice falling within the jurisdiction of such a court." From Mr. Oxley's well known abilities in this line we would expect to find, what we do find in this work, evidences of great care in its compilation. The head notes are particularly clear, and all that could be desired. The paper and type, too, are of excellent quality; and a most creditable volume has thus been added to our Canadian Reports.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Excuses for non-performance of contracts.—*Central L. J.*, Nov. 10.
Charter parties.—*Am. Law Review*, Nov.
Impeachable offences under the constitution of the United States.—*Ib.*
Discriminative tariff rates.—*Ib.*
A history of the English Judicature.—*London L. J.*, Sept. 16, *et seq.*
Solicitor's relations with sheriff.—*Ib.*, Sept. 23.
Contracts as to employers' liability.—*Ib.*, Oct. 21.
Perpetuities arising out of contract.—*Ib.*, Oct. 28.
Excluding counter-claims.—*Ib.*, Nov. 4.
Privilege of witness as to criminating questions.—*Irish L. T.*, Oct. 14.
The law relating to burglars.—*Ib.*
Indemnity of trustees for wrongs.—*Justice of the Peace.*
Recent decisions on attachment of the person.—*Law Times.*
Contempt of Court.—*Irish L. T.*, Nov. 4.
Conveyance of easements by implication.—*Albany L. J.*, Sept. 23.
Common words and phrases.—*Ib.*, Oct. 14.
Once in jeopardy — Subsequent indictment founded on same transaction.—*Ib.*, Oct. 21.
Negotiable instrument—Time of payment.—*Ib.*, Oct. 28.
Promissory note payable on or before a specified day.—*Ib.*
Evidence of defendant's good character in civil actions.—*Ib.*, Nov. 11.
Burden of proof as to testator's sanity.—*Ib.*, Nov. 11.
Estoppels against married women.—*Southern Law Review*, Nov.
The law in relation to crops.—*Ib.*
Negotiability of detached coupons.—*Ib.*
Disfranchisement from private corporations.—*Am. Law Register.*
Partnership—Implied power to bind the firm by negotiable paper.—*Central L. J.*, Oct. 20.
The foreclosure of pledges.—*Ib.*, Nov. 17.
Equitable consideration.—*Ib.*

Canada Law Journal.

VOL. XVIII. DECEMBER 15, 1882. NO. 22.

DIARY FOR DECEMBER.

17. Sun... *3rd Sunday in Advent.* First Lower Canada Parliament met, 1792.
22. Fri. .. Shortest day.
24. Sun... *4th Sunday in Advent.* Christmas vacation in Court of Appeal and Chancery Division begins.
25. Mon.. Christmas Day. Municipal Nominations.
26. Tue .. U. C. made a Province, 1791.
27. Wed.. Spragge, V.C., appointed Chancellor, 1879.
31. Sun .. *1st Sunday after Christmas.* Rev. Stat. of Ontario came into force, 1877.

TORONTO, DEC. 15, 1882.

THE New York Court of Appeals has recently held, following the drift of the American cases, that the holder of a mortgage upon real estate, upon which there are unpaid taxes, is entitled to pay the same and add the amount to the mortgage debt on foreclosure, although the mortgage contains no provision allowing him to do so: *Albany L. J.*, Nov. 25. We do not remember any case on the point at this moment, but this has been for years the practice in Ontario.

HON. LEWIS WALLBRIDGE, Q.C., has been appointed Chief Justice of Manitoba in the room of the late Hon. Mr. Wood. The appointment will, we think, be favourably received. The desire of the profession there was to have a man from the Equity Bar as their presiding Judge, in view of the kind of litigation that prevails in that Province. But though they are disappointed in this, they will have in Mr. Wallbridge a sound lawyer and one of large experience in all branches of the law, most genial and courteous in his manner, and personally everything that the most fastidious could wish.

SWEARING by telephone has recently been discussed in some of our exchanges. Whilst by a few the idea has been received with favour, as evidencing the progress of civilization and as a matter of convenience, there is not much fear of its coming into use in this conntry. Even the go-ahead Yankee finds unanswerable arguments against it. The *Albany Law Journal* says:-

"No one can be absolutely certain of the human voice thus communicated. A forged affidavit may be sent to the officer, and an impostor may swear to it by telephone, and a fraud may thus be perpetrated. If a photograph is inadmissible in evidence without proof of the accuracy of the process by the photographer, certainly we cannot repose upon the sound of the human voice communicated over a mile of wire. Even if the officer were acquainted with the voice there would be room for deception. Moreover, the form of taking an oath is thus subordinated to the laziness or convenience of the deponent in a manner quite uncongenial with good ideas of the sanctity and solemnity of oaths and the decorum of public justice."

WE copy from an exchange the following table of statistics as to the causes of suicide, a crime which seems to be terribly on the increase. It was read recently by Dr. Clark Bell, as part of a lecture to the Medico-Legal Society of New York.

Causes of Suicide.	Male.	Female.
Grief caused by loss of parents, etc.	373	193
Grief caused by ingratitude of children	137	74
Grief caused by departure of children	20	20
Grief caused by separation of family	35	16
Forbidden love	938	627
Jealousy between married couples and between lovers	229	118
Grief at quitting a master or a house	53	24
Gambling	157	1
Laziness	76	4
Debauchery	1,569	233
Drunkenness	2,761	441

He suggests as a preventive measure that there should be severe punishment of unsuccessful offenders, and that every effort should be made by the law and by the public to put additional force upon the moral sense of the community by making the crime more odious and detestable. We think if the figures prove anything, they prove that some effort directed against the last two items would be desirable.

IT is a moot point who is the "meanest man on earth." But the defendant in *Reif* v. *Paige*, 13 N. W. Rep. 273 (U.S.), should not be overlooked in this connection. This gentleman's unhappy wife (except in as far as she was happy in leaving the defendant—we trust for a happier home) was in a building which was enveloped in flames. The husband, with great magnanimity and in a burst of uxorious enthusiasm, cried out, "I will give $5,000 to any person who will bring the body of my wife from that building, dead or alive." A fireman, on the faith of the offer, and at the risk of his own life, rushed into the building and brought out the body. Whatever Mr. Paige might have thought his living wife worth, he thought better of his offer as to her dead body, and refused to pay the $5,000, on the grounds: (1) That there was no formal acceptance of the defendant's offer; and (2) that as the latter was a paid official he had only done his duty—which we presume he thought to be a reward sufficient in itself. The Court thought differently, and very properly held that the fireman was not bound to give notice of acceptance of the offer as a condition precedent to recovery, nor was he bound to perform the service as a paid fireman, not being called upon in discharge of his duty to imperil his own life.

RIVERS AND STREAMS.

A careful perusal of the judgment of the Supreme Court in *McLaren* v. *Caldwell*, impresses one that the law as laid down in *Boale* v. *Dickson* is sound; and we shall be surprised if the last judgment on this vexed question is not upheld in England, should the case go there for further consideration. This perusal, however, tells us another thing, and that is, that a "new hand at the bellows" on our staff got hold of the wrong end of it in supposing that the legislation discussed in the case was the act we had occasion to criticise more than a year ago, and the consequent remarks in the item referred to are therefore inappropriate.

The subject of rivers and streams in connection with the lumbering interests has come up in another form, in the case of the *Parry Sound Lumbering Co.* v. *Ferris*, in which the junior Judge of the County of Simcoe (John A. Ardagh, Esq.) gave a judgment which carries conviction with it, and is a clear and exhaustive exposition of the law on the subject. It was published *in extenso* in our last number.

The plaintiffs applied for an order under the Act R. S. O. c. 114, to enable them to turn a lake, some fifteen miles distant from their mill, into a reservoir, for the purpose of improving their property. Evidence was given shewing that to grant the application would prove very injurious to those residing near the lake, and the jury had to determine the question: Would the erection of a dam at the outlet of the lake conduce to the public good? —the Act having directed that it was only in such event that an application of this character should be granted. It was chiefly to this point that the learned judge directed his attention. He shows that the course universally adopted by Legislatures, when passing Acts that may cause the expropriation of a man's property against his will, is to make all such expropriation depend on the answer to the question, "is it for the public good?"

The rights of individuals to deal with their own property, and either sell or retain the same as they may choose, should be respected, and should only be invaded when the general good of the state requires it to be done.

HORSE CASES AND PERJURY.

There is no subject which engages the time of our Division Courts, or which awakens the interest of a large class of our rural population, more than suits respecting the sale or exchange of horses. There is, moreover, no more fruitful source of litigation and contradictory swearing, and frequent positive perjury, than is produced by suits for breaches of warranty in such cases.

It has been said that a barrrel organ and a monkey on a memorable occasion drew away the major part of a largely attended political gathering, at which one of Canada's greatest statesmen was felicitating himself with the idea that the bucolic mind was intensely interested in his speech ; and it is always the experience of our County Court Judges, that the trial of a horse case will ensure a considerable attendance of the washed and unwashed at the Division Court.

The struggle too frequently is one of statement against statement—oath against oath, with perjury on one side or the other, and probably a little on both. These trials are anything but conducive to the public good, in fact are essentially demoralizing—misrepresentation, cunning, falsehood, concealment, the most trivial and dishonest perversion of language, and the meaning of words, are all resorted to, by men otherwise reputed to be respectable, when a horse not sound—in wind or limb—or untrue, or tricky, or baulky, has to be disposed of for more than he is worth, or put upon some man who does not want him at all.

The state of the law of evidence affords the opportunity for both fraud and perjury on this subject, and though it was the object and aim of the Statute of Frauds to prevent frauds and perjuries, we confess it has often proved a failure. Possibly some of the evils we have been considering might very well be made the subject of legislation and the law of evidence amended by the Parliament of the Province. It has been suggested by a correspondent that the law should be changed by giving no right of action except on a written warranty. Take away, it is said, the possibility of denial as respects a warranty, by requiring it to be in writing, or take away the right of action for its breach in case of warranty without writing, and the door would be at once closed to a fruitful source of litigation and demoralization.

It may be argued against this view, that a man purchasing a horse now can very well guard himself by insisting upon a written warranty, or by not making a bargain. This, however, does not meet the case. The objects sought after are to prevent frauds and perjuries by closing the door to men who, purchasing without warranty, find that the animal is not what they expected, and becoming exasperated, bring actions, and then get into the witness box and swear that there was a warranty, and so produce a work of fiction not founded on fact. It is not only men who sell horses who commit perjury, but more often those who trade in these animals. The written warranty should define in black and white what the bargain is, and shut out all possibility of contradiction. The question of soundness or unsoundness, or other facts, would necessarily stand as they do now.

DELEGATION OF LEGISLATIVE POWER.

IN the case of *Regina* v. *Hodge*, 46 Q.B. 141, the power of a Provincial Legislature to delegate to local bodies authority, "first, of creating a *quasi* offence, and then of punishing it by fine and imprisonment," was denied—

Hagarty, C.J., holding that "it is a power that must be exercised by the Legislature alone."

From that decision the Attorney General, under the Act 44 Vict. c. 22, s. 17, appealed to the Court of Appeal; and the latter Court, by a unanimous judgment, (7 App. R 246), reversed the decision of the Queen's Bench, and affirmed the power of the Provincial Legislature to delegate to local bodies the authority to punish infractions of their by-laws or regulations by fine and imprisonment; but holding that in the case appealed the Legislature had not delegated any authority to create "new restrictions and limitations on individual liberty of action."

The delegation to local bodies of legislative power to make rules and regulations, and to provide punishment for the infraction of them, was conferred upon municipal bodies in England by the Municipal Corporations Act, 5 & 6 Wm. IV. c. 76, s. 90, which empowered the council of each corporation to make by-laws for the good rule and government of the borough, etc., and to appoint by such by-laws, such fines as they should deem necessary for the prevention and supression of offences—such fines not to exceed £5, and to be levied by distress, and in default of a sufficient distress the offender to be imprisoned for a term not exceeding one month.

In the United States, it has been held that although the proposition that the Legislature is alone competent to make laws is true; yet it is also settled that it is competent for a Legislature to delegate to municipal corporations the power to make by-laws and ordinances which shall have the force, in favor of the municipality and against persons bound thereby, of laws passed by the Legislature (1 Dillon Mun. Corp. 322). And further that municipal corporations have an implied power to proceed for the enforcement of their by-laws and ordinances by reasonable and proper fines against those who break them,—for a by-law or ordinance without a penalty would be nugatory (1 Dillon 345).

This power to delegate to local bodies authority to prescribe rules and regulations appears to have been exercised by the former Legislature of Upper Canada from its first session in 1792. The Act 33 Geo. III. c. 2, provided that overseers of highways should be elected, who should determine upon the height and sufficiency of any fence or fences within their parish or township "conformably to any resolution agreed upon by the inhabitants" at the meeting of election. Again, 34 Geo. III. c. 8, authorized the inhabitant householders in every district, at their annual town meeting, to ascertain and determine, in what manner and at what periods, horned cattle, horses, etc., should be allowed to run at large, and to resolve that the same, or any part thereof, should be restrained from so doing; and that any such cattle, etc., found at large, contrary to the regulations of the town meeting, should be impounded until such fees as the Justices in Quarter Session should determine, should be paid to the pound-keeper.

But the most important exercise of this power to delegate legislative authority appears in the Acts which authorized the Commissioners of the Peace in various districts to establish markets for the sale of meat, butter, eggs, etc. Under these Acts the Commissioners were authorized to appoint the days and hours for such sales in such markets, and to make such orders and regulations relative thereto as they should deem expedient—adding this further power: "to impose such fines not exceeding 20s., for any offence committed against such rules and regulations, as to them in their discretion shall seem requisite and proper;" and providing that "if any person shall transgress the orders and regulations so made by the said Commissioners, such person shall, for every such transgression, forfeit the sum which in every such order rule and regulation shall be specified." The Acts delegating this legislative power are: 41 Geo.

III. c. 3; 54 Geo. III. c. 15; 57 Geo. III. c. 4; 59 Geo. III. c. 4; 2 Geo. IV. c. 15; 1 Wm. IV. c. 5, etc.

By other Acts the Magistrates in Quarter Sessions were authorized to make "prudential rules and regulations" respecting certain specified municipal matters, and also to prescribe such reasonable fines, within certain limits, as they might think proper, for every offence committed against their rules and regulations. (See 57 Geo. III. c. 3; 59 Geo. III c. 5; 4 Geo. IV. c. 30; 7 Geo. IV. c. 12, etc.)

The Act 59 Geo. III. c. 2., authorized the Justices in Quarter Sessions to limit the number of inns and public houses in their districts, and to apportion the fees to be paid for a license according to the situation of the inn; and they were also authorized "to frame rules and regulations for the observance of the several innkeepers in their respective districts," which rules and regulations the said innkeepers were to be bound by their recognizances to abide by.

By other Acts Boards of Police were authorized to make rules, ordinances and by-laws, respecting municipal matters, "and to enforce the due observance thereof, by inflicting penalties on any person for the violation of any by-law or ordinance of the said corporation, not exceeding one pound ten shillings." (See 2 Wm. IV. c. 17; 3 Wm. IV. c. 16; 4 Wm. IV. c. 25. c. 26, c. 27; 6 Wm. IV. c. 14; 7 Wm. IV, c. 42, c. 44; 1 Vict. c. 27; 3 Vict. c. 31, etc.

The Legislature of the late Province of Canada, at its first session in 1841, delegated large powers of legislation to the District Councils (4 & 5 Vict. c. 10), and authorized them to impose reasonable penalties in certain cases. These powers were greatly enlarged by 12 Vict. c. 81, 14 & 15 Vict. c. 109, 22 Vict. c. 99, and other Acts. Prior to Confederation the legislative power delegated to the Municipal Council of each county, township, city, town and village authorized them to legislate over a wide range of municipal subjects, and empowered them to pass by-laws (29 & 30 Vict. c. 51): (1) "For inflicting reasonable fines and penalties not exceeding fifty dollars and costs, (*a*) upon any person for the non-performance of his duties who has been elected or appointed to any office in the corporation, and who has accepted such office and taken the oaths, and afterwards neglects the duties thereof; and (*b*) for breach of any of the by-laws of the corporation. (2) For inflicting reasonable punishment by imprisonment, with or without hard labour, either in a lock-up house in some town or village in the township, or in the county gaol or house of correction, for any period not exceeding twenty-one days, for breach of any by-laws of the Council, in case of non-payment of the fine inflicted for any such breach, and there being no distress found out of which such fine can be levied; except for breach of any by-law or by-laws in cities, and the suppression of houses of ill-fame, for which the imprisonment may be for any period not exceeding six months, in case of the non-payment of the costs and fines inflicted, and there being no sufficient distress as aforesaid."

These provisions were re-enacted by the Ontario Legislature in 36 Vict. c. 48, and R. S. O. c. 174. And by various Acts respecting tavern licenses, from the earliest passed in 1869, 32 Vict. c. 32, to R S. O. c. 181, the local license authorities were empowered to pass by-laws or resolutions respecting the number and regulation of taverns, and "to attach penalties for the infraction thereof."

The Parliament of Canada has also delegated legislative authority to the Governor-General in Council in various matters; and in the Penetentiary Act, 31 Vict. c. 75, it has empowered the Directors of Penitentiaries "to make rules and regulations for the management, discipline and police of the penitentiaries, and for the duties and conduct of the wardens thereof, and of every other officer or class of officers or servants employed therein, and for the diet, clothing, maintenance, employment, instruction, discipline,

correction, punishment and reward of convicts imprisoned therein."

These references sufficiently illustrate the extent of the delegation of legislative power by the Imperial Parliament and Legislatures of Canada, since the establishment of colonial parliamentary government.

Few will deny to the Imperial Parliament, or even to the Parliament of Canada, the power to delegate legislative authority to subordinate bodies. But it is contended that although such power is within the legislative functions of the Imperial Parliament and the Parliament of Canada, it has not been expressly or impliedly conferred upon the Provincial Legislatures. If the power is not so conferred, then there is some reason to question the delegation of legislative authority to the municipalities by the Ontario Legislature.

Mr. Todd, in his work on "Parliamentary Government in the Colonies," says, (p. 367), "under their several constitutions, and pursuant to the 92nd section of the B. N. A. Act, these Local Legislatures possess powers of legislation as complete and absolute, within their exclusive jurisdiction, as those enjoyed by the Dominion Parliament, or even by the Parliament of the mother country, within the respective spheres."

Judicial opinion sustains this view. Draper, C.J., in *re Goodhue*, (19 Gr. 386), said: "Conceding to the fullest extent that the powers of the Legislature of Ontario are defined and limited by the B. N. A. Act, I conceive that, within those limitations, Acts passed in the mode described by that statute are, as to the Courts and people of this Province, supreme;" and Strong, V.C., added that where property and civil rights within the Province are affected, the Provincial Legislature has power to pass Acts "to the same unlimited extent that the Imperal Parliament has in the United Kingdom."

In *Regina* v. *Hodge*, (7 App. R. 246), Spragge, C.J., in referring to the distribution of legislative power, said: "I do not propose to attempt a definition of the powers conferred by the Imperial Parliament by the B. N. A. Act, upon the Dominion Parliament and Provincial Legislatures respectively. They each derive their powers from the same source; and the power to make laws in relation to the several classes of subjects, legislation upon which is by the Imperal Act committed exclusiveiy to the Provincial Legislatures, is as large and complete as it is in the classes of subjects committed, by enumeration of subjects, to the Dominion Parliament. The limits of the subjects is prescribed, but within those limits the authority to legislate is not limited." On the same point, Burton, J.A., said: "Reading the powers granted in section 92, with the exceptions where they occur in section 91 (of the B. N. A. Act) the Local Legislature is absolute and supreme over those subject matters, with as ample a power to legislate in respect of them as the Imperial Parliament, and without any possibility of interference by the Dominion Legislature." * * * "It is true that the Imperial Parliament gave both to the Dominion and to the Provinces the constitutions under which we live; both limited in extent, but both giving representative institutions, and giving to the legislatures elected in the manner pointed out, plenary powers of legislation as large and ample as those of the Imperial Parliament itself. The Legislatures so elected have a delegated authority it is true, but it is of the same character as that of the Imperial Parliament, who are collectively the delegates of the whole people."

The Imperial decisions are consistent with these views. In *Phillips* v. *Eyre*, (L. R. 6 Q. B. 20,) Willes, J., said: "A confirmed Act of a Legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence, the operation and force of sovereign legislation." And Lord Selborne, L.C., in defining the limited legislative powers of the Indian Legislature, in *Regina* v. *Burah*, (3 App. Case, 904,) said: "The Indian Legislature has powers expressly limited by the Act of the Imperial

Parliament which created it, and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament; but has, and was intended to have, plenary powers of legislation, as large and of the same nature as those of Parliament itself."

Imperial legislation affecting colonial laws is in harmony with these views as to plenary powers of legislation. By the Imperial Act 28 & 29 Vict. c. 63, it is enacted that any colonial law which is repugnant to any Imperial Act extending to the colony, shall, to the extent of such repugnancy, but not otherwise, be void and inoperative; and repugnancy to the law of England shall not render such colonial law void or inoperative..

If the judicial interpretation of colonial legislative power is correct, then it logically follows that the Provincial Legislatures, within their limits, "have plenary powers of legislation as large, and of the same nature, as those of the Imperial Parliament itself." And as the B. N. A. Act gives them express power to establish municipal institutions, this delegation of legislative authority necessarily follows, as an incident to the exercise of that power.

We understand that the case of *Regina* v *Hodge* is to be appealed to the Privy Council as a test case on the right of Provincial Legislatures to delegate to local bodies legislative power to prescribe regulations and to attach penalties for their infraction. But in case there should be a difficulty in giving to the words authorizing the License Commissioners "to impose penalties," the wide interpretation claimed by the prosecution in this case, it would be judicious for the Legislature at its present session to adapt to the license law the express powers as to penalties and punishments given to municipalities by the Municipal Act.

T. H.

SELECTIONS.

RECORDS OF DEEDS, WHEN NOTICE, AND OF WHAT.

At common law no record was required of a deed; title was passed by the livery of seisin. By the statute of uses, deeds made under it were required to be enrolled This enrolment is something distinct from the system of recording deeds universally adopted in the United States.* Enrolment is necessary to deeds under the English statute, but, as between parties, deeds of bargain and sales in the United States are generally good, although not recorded.†

Recording is, then, only necessary to give notice to third parties of the conveyance, and to preserve proof of it. As to notice to third persons, if actual notice exist, no record need be proved, but the deed is good as to such subsequent purchasers with notice.

What is actual notice is sometimes a matter of doubt. Whilst, in some States, the actual notice must be such as will prevent the grantee in a subsequent recorded deed from taking precedence of the grantee in a prior unrecorded one, on the ground that it would be fraud on the part of such grantee to purchase, attach or levy on the land to the prejudice of the first purchaser, generally whatever is sufficient to direct a prudent man's attention to the prior rights and equities of others, and enable him to ascertain them upon inquiry, will be sufficient to charge him with notice of such facts.‡ But it is less to the consideratiou of what is actual notice, than of what is the constructive notice arising from the record, and to what such notice extends, and whom it affects, and how it begins, and when, that the inquiry of this article is directed. And generally the notice is only of such things as appear properly by the record, so that if a deed be improperly recorded, it is not notice.§ And it is notice only of such things as appear by the record, and no others. Such is the ruling of Chancellor Kent in

* Martindale on Conveyancing, sec. 260.

† "In North Carolina, no conveyancing shall be good unless the same shall be registered in the county where the land shall be situate [two years after the date of said deed." Laws 1876-7 ch. p. 23[illegible].

‡ Martindale on Conveyancing, sec. 231, and notes.

§ *Hainer* v. *Miller*, 73 Mo. 417, and cases cited; *Dail* v. *Moore*, 51 Mo. [illegible]; *Black* v. *Gregg*, 58 Mo. 565; *Stevens* v. *Hampton*, 46 Mo. 404; *Kran* v. *Carr*, 46 Mo 483; *Bishop* v. *Schneider*, 46 Mo. 472; Martindale on Conveyancing, sec. 271 and notes and cases cited.

Frost v. *Beckman* * He held that the registry is notice of itself, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the register. It is the business of the mortgagee; and, if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. "The registry is intended as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look at his peril to the contents of every mortgage, and be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy of the statute." This ruling has been generally followed.† In *Terrell* v. *Andrew County*, ‡ the court say, "it is contended here on behalf of the county that, according to our statute, when a person files with the recorder an instrument, it imparts notice of its real contents to all subsequent purchasers, regardless of any mistake that the recorder may commit in placing it on record." * * * * "According to the literal interpretation of the section, no notice is imparted till the instrument is actually placed on record, and then it relates back to the time of filing. It was, no doubt, the intention of the legislature to give a person filing an instrument or conveyance all the benefit of his diligence, and when he deposits the same with the recorder and has it placed on file, he has done all that he can do, and has complied with the requirements of the law. From that time it will give full notice to all subsequent purchasers and encumbrancers. A person in the examination of titles, first searches the records; and, if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unencumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded, or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. * * * * Hard and uncertain would be the fate of subsequent purchasers, if they could not rely upon the records, but must be made under the necessity, before they act, of tracing up the original deed to see that it is properly recorded. The statute says that when the deed is certified and recorded, it shall impart notice of the contents from the time of filing. Certainly, but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and labourious search to find out whether the recorder had faithfully performed his duty."

This was a case where a mortgage for $400 was recorded as one for $200 only. It has been, however, held *contra*, that a party performs his duty by leaving his deed for record with the proper officer, and the mistake or faults of the officer do not affect his right.* In this case there was a strong suspicion that the record had been tampered with, and it was held that the certificate of the recorder was proof that the deed had been recorded. So in Alabama under a statute making a conveyance operative as a record from the time it was left for registration, held that a mortgage was a valid lien for the whole amount, though incorrectly recorded for a smaller sum.†

It is held that the record of a deed is notice, whether indexed or not.‡ In *Sawyer* v. *Adams*, the town clerk copied a deed delivered to him for record on a book which had ceased to be a book for recording for a number of years, and for the purpose of concealment and fraud, did not insert the names in the index. Held, the deed was not recorded. In *Bishop* v. *Schneider*, a distinction is drawn between this case and one where the deed was regularly spread upon the record, but simply not indexed; the Court quoting from

* 1 John. Ch. 288.

† *Sanger* v. *Craigne*, 10 Vt. 555 *Jennings* v. *Wood*, 20 Ohio, 261; *Shepherd* v. *Burkhalter*, 13 Ga. 443; *Terrell* v. *Andrew Co.*, 44 Mo. 309; *Chamberlain* v. *Bell*, 7 Cal 292; *Miller* v. *Bradford*, 12 Iowa, 14; *Baldwin* v. *Marshall*, 2 Humph. 116; *Brydon* v. *Campbell*, 40 Md. 331; *Breed* v. *Conley*, 14 Iowa, 269; *Gwynn* v. *Turner*, 18 Iowa, 1; *Gilchrist* v. *Gough*, 63 Ind. 576; *Chamberlain* v. *Bell*, 7 Cal. 292; *Barnard* v. *Campan*, 29 Mich. 162; *Digman* v. *McCollum*, 47 Mo. 372.

‡ *Supra.*

Merrick v. *Wallace*, 19 Ill. 486.

† *Mims* v. *Mims*, 35 Ala. 23. See, also, *Dubose* v. *Young*, 10 Ala. 365; *Bank of Kentucky* v *Hagan*, 1 A. K. Marsh, 356.

‡ *Bishop* v. *Schneider*, 46 Mo. 472; *Chatham* v. *Bradford*, 50 Ga. 327; *Musgrove* v. *Bouser*, 5 Oreg. 313; *Board, etc.* v. *Babcock*, Id. 472; *Curtis* v. *Lyman*, 24 Vt. 338. But see *Speer* v. *Evans*, 47 Pa. St. 144; *Barney* v. *McCarty*, 15 Iowa, 522; *Whalley* v. *Small*, 25 Iowa, 188; *Sawyer* v. *Adams*, 8 Vt. 172.

Curtis v *Lyman*,* where it was held that the index was no part of the record, continues that "the proper office of the index is what its name imports—to point to the record but that it forms and constitutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section for the purpose of facilitating research, besides recording, devolves a separate, distinct and independent duty upon the recorder, and in the event of non-compliance with that duty, the party injured has his redress. The purchaser or grantee, when he has delivered his deed, and seen that it was correctly copied, has done all that the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for the injury."

But, though the index is generally not considered part of the record, the entry-books required to be kept, on which the names of grantors (or mortgagors), grantees (or mortgagees), date of reception, description of land, etc., are entered, under statutes providing that an instrument shall be considered as recorded at the time so noted, are so considered, and the purchaser takes with notice of such things as are properly placed on said entry books.† In this case the name of the mortgagee was omitted from the record, but appeared on the entry-book. Held, "that this error did not defeat it as to subsequent purchasers, as the two books together supplied all necessary information." It is said in effect by the court, that the mortgage was recorded when noted in the entry-book, that some time must elapse between the entry and the actual copying of the instrument upon the record-book, and during such time the entry-book will constitute the record, not complete in itself, as not containing a particular description of the land, but directing the inquirer to the deed on file, the two together giving full information. They ask, when did it cease to be recorded? "Was it when a more complete record was attempted?" "No doubt the entry in the entry-book loses its importance when the instrument entered is properly recorded, because from that time the completed record gives the fullest information, and it will be that to which the index will refer persons who are searching the records. But it will remain a record nevertheless, and it may have its importance in some cases. Every man who finds a mortgage recorded, is notified by the date of the record, that there is a record of certain particulars respecting the mortgage in the entry-book, which he can at once refer to; and if any of those particulars chance to be omitted in the record-book of mortgages, he understands where he can obtain information concerning them." The case is contrasted with that of *Jennings* v. *Wood*,* in which the name of the grantor was omitted in the record, for the opinion continues, "for means of tracing the conveyances are lost when you do not find in the index as grantor or mortgagor, the name of the party in whom the title appears to stand." The case of *Jennings* v. *Wood* was one in which a deed was recorded as that of Samuel Granger, when it should have been Lemuel. Held, no notice to purchasers as deed of Lemuel Granger. This case is not inconsistent with that of *Gilchrist* v. *Gough*,† where, under a statute of the same character with the Michigan statute, the record of a mortgage for $5,000 was erroneously made as for $500, but the entry-book correctly stated it as being one for $5,000. It was held that the entry-book was notice only of such things as the statute in express terms required to be noted in it. Such entries were notice of the existence of the deed, its exact date of reception, of the parties thereto, grantors and grantees, and of the description of the lands to be affected thereby; but the fact that an entry must also be made of the volume and page where such deed or other instrument could be found of record, showed very clearly, the court thought, that it never was intended that the entry in the "entry-book" should be notice of the contents of such deed or instrument. They held, moreover, that actual knowledge of the mortgage being indexed as one for $5,000, did not put a person on inquiry. So it may not conflict with *Terrell* v. *Andrew County*, for in that case a mortgage for $400 was recorded as one for $200; and further, the Missouri statute differs from that of Michigan and Indiana, the latter saying that "such instrument shall be

* 24 Vt. 338.
† *Sinclair* v. *Slawson*, 11 C. L. J. 68.

* 20 Ohio, 261
† 63 Ind. 576.

deemed as recorded at the time so noted;" while the Missouri statute provides, "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof," etc. The court, in *Terrell* v. *Andrew County*, saying that under it, it was the record that imparted notice which related back to the time of filing.

As to defects in deeds or their acknowledgment, in Missouri the court held in *McClurg* v. *Phillips*,* that an unsealed mortgage was properly recorded as an equitable mortgage.† So as to official seals, the record need not show any copy of the seal or scroll as indicating the officer's seal, the statement in the certificate raising the presumption that the seal was attached.‡ On the other hand, "a notary's certificate is not rendered invalid by reason of the mere fact that it purports to be executed under his 'hand and official signature,' and that his notarial seal is not mentioned therein, where the seal is attached to the certificate. And in such case, a copy taken from the recorder need not have the impress of the original seal; that may be indicated by a scroll."§

In many of the States time is allowed parties to record their deeds, and if recorded within that time, they are valid as against purchasers after its date and before record. In such cases, the record may be considered notice from the date of the deed, or as relating back to the date of the deed. Is a party who actually sees an imperfectly acknowledged conveyance, affected with actual notice? In *Musick* v. *Barney*,‖ it is said that it would be very strong, if not conclusive, evidence of such notice. So, if the party's agent or investigator saw such a deed, it should put him on inquiry, as affecting him with actual notice of such deed. *-Central Law Journal.*

* 57 Mo. 214.

† See, too, *Parkinson* v. *Caplinger*, 65 Mo. 290.

‡ *Geary* v. *Kansas City*, 61 Mo. 378; *Griffin* v. *Shefaeld*, 38 Miss. 359.

§ *Dale* v. *Wright*, 57 Mo. 110; *Clark* v. *Rynex*, 53 Mo. 380.

‖ 49 Mo. 458.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

COUNTY COURT OF THE COUNTY OF VICTORIA.

BRADLEY v. BRADLEY.

Bills and notes—Double stamping—Effect of repeal of statute—45 Vict., cap. 1.

A promissory note void for want of stamps, at the time of the passing of 45 Vict. cap. 1, which repeals stamp duties, cannot be made good by affixing double stamps as theretofore allowable.

[Lindsay, Nov. 16, 1882.

Action on two promissory notes dated 1st December, 1879, for $250 and $50 respectively, made by the defendant in favour of the plaintiff. The defendant pleaded want of stamps. The plaintiff replied, alleging double stamping since the passing of 45 Vict. cap. 1. To this reply the defendant demurred, the fourth ground being that, 45 Vict. cap. 1, repealing the Stamp Act took away the right to double stamp, and if the note was void at the time of passing of that Act there was now no authority to make it good.

On the argument the plaintiff asked leave, if the case should be decided against her, to amend, alleging that she was not aware of the defect in stamping until after passing of the Act, and contended that such a reply would be good.

G. H. Hopkins, for the demurrer.

D. J. McIntyre, contra.

HUDSPETH, Deputy Judge: It seems to me that the fourth ground of demurrer, if good, disposes of the matter, and that there is no necessity for considering the other grounds, some of which, no doubt, could be cured by amendment.

The action is brought to recover the amount of two promissory notes. The fourth paragraph of the statement of defence sets up the want of stamps. The second paragraph in the joinder and reply asserts that after the promissory notes were made the plaintiff paid double duty thereon by affixing to each of the said notes stamps to the amount thereof, and cancelling the same as required by the statute in that behalf made and provided. To this the defendant demurs. The fourth ground of demurrer being that 45 Vict. cap 1, repealing the Stamp Act took away the right to double stamp.

In *Sunter* v. *Ellison*, 9 B. & C. 752, Lord Tenterden, C J., says: -"It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed), as if it had never existed. That is the general rule, and we must not destroy that by indulging in conjectures as to the intention of the Legislature. We are, therefore, to look at the statute, 6 Geo. IV. c. 16, as if it were the first that had ever been passed on the subject, etc.; and so considering it we cannot possibly say that there was any sufficient trading to support the commission."

It is certainly very unfortunate that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. It is said that the last will of a party is to be favourably construed, because the testator is *inops consilii*. That we cannot say of the Legislature, but we must say that it is "*magnas inter opes inops*."

In order to decide whether any particular transaction is affected by the repeal of the Act, it is necessary to ascertain whether the transaction in question was complete or incomplete at the time the Act was repealed. Now, if an Act gives a right to do anything, the act to be done, if duly commenced, but not completed, before the Act is repealed, must upon the repeal of the Act, be left in *statu quo*. Thus in *R.* v. *Maughan*, 8 A. & E. 496, a presentmnnt as to the non repair of a highway had been made under 13 Geo. III. c. 78, s. 24, but before the case came on to be tried, the above-mentioned Act was repealed. Consequently no further proceedings could be taken. "If," said Lord Denman, C. J., "the question had related merely to the presentment, that no doubt is complete. But *dum loquimur*, we have lost the power of giving effect to anything that takes place under that proceeding." And Littledale, J., added, "I do not say that what is already done has become bad, but that no more can be done."

But if a right has once been acquired by virtue of some statute, it will not be taken away by the repeal of the statute under which it was acquired. "The law itself," says Baron Puffendorf, in his Law of Nature and Nations Bk. 1 C. 6, s. 6, "may be disannulled by the author, but the right acquired by virtue of that law whilst in force must still remain: for together with a law to take away all its precedent effects would be a high piece of injustice." Thus in *Jacques* v. *Withey*, 1 H. Bl. 55, it appears that it being illegal by virtue of 22 Geo. III. c. 47, to insure tickets in a lottery, a contract for insuring lottery tickets was void, and that consequently any money that had been paid in pursuance of such a contract might be recovered back. After a contract of this kind had been entered into, and after money had been paid by the plaintiff to the defendant in pursuance of it, the Act of 22 Geo. III. c. 47, was repealed, consequently it was argued that as such contracts were no longer illegal, the money which had been paid before the repeal of the Act could not be recovered back in an action which had not been commenced until after the repeal of the Act. It was held, however, that a contract which was void by statute when made, could not be set up again by the repeal of the statute between the time of contracting and the commencement of the suit. "If," said Coleridge, J., in commenting on the case of *Hitchcock* v. *Way*, 6 A. & E. 947, "it had been originally a good contract, and a statute had been passed which made it void, and then that statute had been repealed, the contract would have been set up again. But here there was originally a void contract by virtue of a statute, and, therefore, it cannot be made valid by the repeal of that statute." See Hardcastle on Statutory Law, 217.

In this case the notes were invalid under the Stamp Acts, because they were not properly stamped. "It is true, as urged on behalf of the plaintiff, the owner might have stamped them by affixing double duty, when she first acquired the knowledge, if she had been in ignorance of the fact, but unfortunately she did not so stamp them, and the Act 45 Victoria, cap. 1, was passed repealing the Stamp Act, and rendering it impossible for her to make the notes valid.

The demurrer is, in my opinion, a complete answer to the action, and I give judgment thereon for the defendant with costs.

McIntyre & Stewart, solicitors for plaintiff.
Martin & Hopkins, solicitors for defendants.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

SEGSWORTH v. MERIDEN SILVER PLATING CO.

Interpleader issue—Chattel mortgage—Description of property — Pressure — Preference — R. S. O. c. 118—Costs.

R. being a creditor of A., applied to him to give security for his debt, and under threat of suing him procured from him a chattel mortgage on his stock in trade. Although R. knew A. to be in difficulties, and had also the means of learning that he was insolvent, it did not appear that he actually knew that it was insolvent when he obtained the mortgage.

Held, that the mortgage given under such circumstances was not a fraudulent preference within R. S. O. c. 118.

The goods and chattels were described in a chattel mortgage as follows :—Certain specific articles were first enumerated ; the description then proceeded, "also the stock of gold and silver watches, jewelry, and electro silver plate which, at the date hereof, is in the possession of the mortgagor in his said store, and also all such stock of gold and silver watches, jewelry, and electro silver plate which the mortgagor may hereafter, during the currency of this indenture or of any renewal thereof, get, take and receive into his possession in his said store, either to replenish such stock or otherwise howsoever."

The evidence showed that the electro plated goods and watches were numbered, and might have been identified thereby. There was no evidence that any of the goods claimed by the mortgagee had been acquired by the mortgagor after the date of the mortgage.

Held, the description of the goods was sufficient.

Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared, on the trial of an interpleader issue between the mortgagee and the execution creditor, that some of the goods seized, amounting to one-sixth of the total value, were not covered by the mortgage.

Semble, although the mortgagee would be entitled to the general costs of the issue, a deduction of one-sixth should be made in respect of the goods as to which he failed.

The Chancellor.] [Dec. 1.

PETRIE v. HUNTER.
GUEST v. HUNTER.

Mechanics' lien—Contractor—Sub-contractor—Novation — Condition precedent—Architect's certificate.

Where a contractor for the building of a house makes default in carrying on the work, and in consequence the owner, acting under a clause in the contract to that effect, dismisses him, and agreed verbally with a sub-contractor, who had been employed by the contractor, that if the latter will go on and finish the work he, the owner, would pay him.

Held, that an agreement made with a sub-contractor, under such circumstances, is a new and independent contract, and is not a contract to answer for the debt, default or miscarriage of another within the Statute of Frauds, and is therefore valid and binding although not in writing. *Bond* v. *Treahy*, 37 U. C. Q. B. 360, distinguished.

Held, that from the making of such agreement the sub-contractor was entitled to a lien as a "contractor," and was no longer in the position of a sub-contractor.

Held, that the sub-contractor, acting under such an agreement, was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, etc.

Held also, that the non-production of an architect's certificate approving of the work done, though required by the origiginal contract with the dismissed contractor as a condition precedent to payment, even if it were binding on the sub-contractor under the new agreement, could not preclude the sub-contractor from recovering if the work was so done as morally to entitle the sub-contractor to such certificate, following *Lewis* v. *Hoare*, 44 L. T. N. S. 66.

Davidson Black, for plaintiffs in both actions.

J. Reeve, for defendant Hunter.

ATTORNEY-GENERAL v. MIDLAND RY. CO.

Ejectment by crown—Statute of Limitations—Pleading—Demurrer—Costs.

In an action by the Attorney-General upon the relation of the Bursar of Toronto University to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the University. The defendants pleaded, in their statement of defence, that the land in question had been, with the assent and permission of the University and the Bursar as agent, taken possession of by the defendants for the purposes of their railway in that behalf under the statutory powers enabling them to expropriate the land, and that they had since retained and then were in possession thereof, and submitting that the sole remedy of the plaintiff was to recover compensation ; and also that the claim of the plaintiff was barred by the Statute of Limitations.

Held, on demurrer, that it was not necessary to set out specifically the Act under which the alleged expropriation took place, or the various proceedings connected therewith.

Held, also, that the Statute of Limitations was no bar to the action, although the action was brought by the Crown in its capacity as Royal Trustee of the land in question, and a demurrer to that part of the defence was allowed. *Reg.* v. *Williams*, 39 U. C. Q. B. 397, approved ; *Attorney-General* v. *Magdaline College*, 6 H. L. C., distinguished.

Held, also, that in the case of a partial demurrer to a statement of defence, if any one or more paragraphs be demurred to, the Court may properly look at any other paragraph or paragraphs bearing on the same matter of defence, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled.

Held, also, that when a pleading is ambiguous or uncertain the proper remedy is to apply in Chambers to strike out or amend the defective matter, and that a demurrer on that ground will not lie.

Held, also, that the demurrer being partly successful and partly unsuccessful, neither party should get costs.

J. Patterson, for plaintiff.

J. Bethune, Q.C., and *D. Black*, for defendants.

Ferguson. J.] [Dec. 9.

RE BINGHAM V. WRIGGLESWORTH.

Vendor and purchaser—Title—Statute of uses—Rule in Shelley's case.

Where by deed certain lands were limited as follows :—*Habendum* "unto the said party of the second part, his heirs, executors, administrators and assigns, upon the following trusts, that is to say, in trust for the sole and separate use of the party of the first part (the grantor) for his natural life, and after his decease in trust for the said party of the third part (the grantor's wife) for her natural life, and after her decease in trust for the heirs of the party of the first part forever. And in the event of the party of the first part surviving the party of the third part, then upon the further trust and confidence forthwith to convey and revest the said trust premises to and in the said party of the first part, his heirs, executors, administrators and assigns, for his and their own proper use and benefit forever. But should the said party of the third part survive the said party of the first part, then and in that event, and in the further event of the decease of the party of the third part, upon trust to convey, transfer and make over the said trust premises to such person or persous, and in such shares interests and proportions, and for such estates' and in such manner, and upon such considerations as the said party of the first part shall in and by his last will and testament order, designate and appoint. But in the event of the said party of the first part dying intestate, then in trust to sell and dispose of, by private sale or public auction, for the most money, or to convey, transfer and set over the said premises for his heirs, executors, administrators and assigns."

Held, the grantor was entitled to the fee subject to the life estate in favour of his wife.

Held, also, that the three parties to the deed could make a good conveyance to a purchaser of the fee simple in possession.

Ferguson, J.] [Dec. 9.

WILKINS V. MCLEAN.

Pledge of mortgage—Account—Equity of redemption.

Where an indenture of mortgage belonging to a trust estate was deposited by the trustee with

a third party as security for an advance to the trustee, and the pledgee subsequently representing himself to be interested in the mortgaged estate, procured a conveyance of the equity of redemption, which he resold at a profit.

Held, that he was not bound to account to the pledgor for the profit so made.

Moss, Q.C., for plaintiff.

W. Cassels, for defendant.

Ferguson, J.] [Dec. 9.

WATSON V. KETCHUM.

Compromise of action—Lien—Arbitration—Condition precedent.

Where upon the trial of an action of ejectment, in the year 1875, an agreement was come to between the plaintiff and defendant in the following terms:—"It is agreed that a verdict be entered for plaintiff by consent, and verdict not to be enforced until defendant shall have been paid $50 towards his costs, and the value of the improvements he has made and are now on the lands in question herein, the value of such improvements to be determined by the award of Peter McNab, Thomas Knight, and Robert Hewitt, or a majority of them. Award to be made in writing on or before the 1st day of June, 1875, or such further time as the arbitrators, or a majority of them, may appoint. Plaintiff agrees to pay said $50 and amount so to be awarded to defendant, and defendant agrees therefore to execute a quit claim deed of said lots to plaintiffs, and give up possession, both parties to release each other from all further claims."

And the plaintiff in the action afterwards, without paying the $50 or the the value of the improvements, signed judgment and recovered possession under a writ of *hab. fac. pos.* Both parties to the action of ejectment died.

No two of the arbitrators named could agree on the amount to be awarded as the value of improvements.

Held, in an action by the devisee of the deceased defendant in ejectment, against the devisee of the deceased plaintiff in ejectment, that the former was entitled to a lien on the land in question for the $50 agreed to be paid, and also for the value of the improvements to be ascertained by the Master.

Held, also, that the attaining of the award of the arbitrators as to the value of the improvements was not a condition precedent to the right to recover therefor.

Ferguson, J.] [Dec. 9.

FOSTER V. STOKES.

School trustees—Election—Waiver—Retraction of waiver.

At an election of school trustees the plaintiffs received the highest number of votes. Objections were made to the validity of the election, but no legal proceedings were taken to set it aside; a meeting, however, was held by the School Board, at which the plaintiffs were present, at which the alleged irregularities in the election proceedings were discussed, and at which it was agreed, the plaintiffs concurring, that there should be a new election. A new election was accordingly ordered to take place; the plaintiffs offered themselves and solicited votes as candidates for election until the day before polling, when the twenty days for protesting the first election had expired, when they claimed to be elected by virtue of the first election. The second election proceeded and the defendants were elected.

Held, the first election had been waived by the plaintiffs, and they could not retract their waiver. Action to declare the second election void dismissed with costs.

Moss, Q.C., for the plaintiffs.

Blake, Q.C., and *R. Meredith*, for the defendants.

Ferguson J.] [Dec. 9.

SUMMERS V. SUMMERS.

Will—Devise of land not owned by testator—Construction of will—Reformation of will.

A testator devised to the plaintiff lot 14 in the 10th concession of Artemisia. The testator did not, and never had owned that lot; but he did own lot 21 in the 14th concession of Artemisia, which was not specifically devised by the will. The residuary devise was as follows: "And the balance of said estate that may remain after paying above bequests, to be paid to my

relatives as my executors may think advisable, after paying them a fair remuneration for their time and expenses."

The plaintiffs claimed to have the clause in the will devising lot 14 "reformed," so as to express the alleged true intention of the testator, and made to read as a devise giving to the plaintiff J. S. the E. ½, and to the plaintiff W. S. the W. ½ of lot 21 in the 14th concession; or that the residuary clause might be construed to vest any undisposed of property absolutely in the executors, and that they might be authorized to convey lot 21 to the plaintiffs in equal proportions.

Held, that the plaintiffs were not entitled to either relief prayed.

Held also, that evidence of the testator's intention was not admissable.

Ferguson, J.] [Dec. 9.

MCCLUNG V. MCCRACKEN.

Specific performance—Contract by agent in his own name—Undisclosed principal—Husband and wife—Statute of frauds, sect. 4.

A husband offered his wife's land in exchange, in a letter addressed to the plaintiff's agents, in the following terms:—"I have had an examination made of the buildings on King street and regret it is of a very unfavourable character. The buildings were, I learn, once condemned, and had to be rebuilt; the tenants have always been of migratory character, never remaining long in them. Under these circumstance I do not feel disposed to entertain Mr. McClung's present offer. If he will assume my mortgage amounting to $11,200, and pay me in cash $3,750, I will assume his mortgage of $5,000 on the easehold. This offer to remain open till to-morrow. I remain, yours truly,

Thomas McCracken.

Messrs. Pearson Bros.

Or I will sell him my south houses for $11,500, $6,000 cash, balance on mortgage to suit his convenience."

The plaintiff accepted the offer in the following terms:—

"—— McCracken, Esquire.

"Your offer of this date for the exchange of my property on King street for your property on St. George street, I will accept on your terms. Yours respectfully, Jno. McClung."

Held, that this was not sufficient contract in writing under the Statute of Frauds as against the wife.

The wife subsequently signed a conveyance of the land to the plaintiff, but the conveyance contained no recital of the alleged contract, was never delivered, and was produced at the trial from her custody.

Held, that the conveyance, under the circumstances, was an unfinished act, and could not be relied on by the plaintiff in support of the alleged contract of which specific performance was sought.

J. E. Rose, Q.C., and *J. H. Macdonald*, for plaintiff.

Jas. Maclennan, Q.C., and *Drayton*, for defendants.

Full Court.] [Dec. 7.

BEATY V. BRYCE.

Appeal to Court of Appeal—Leave to appeal—O. J. A. ss. 33, 34.

When the amount involved in an interpleader issue was under $500, but it was alleged that the decision of the Divisional Court desired to be appealed from affected the right to other property amounting to $2,000.

Held, that this was not a sufficient ground for granting leave to appeal.

Full Court.] [Dec. 7.

O'DONOHOE V. WHITTY.

Appeal to Court of Appeal—Leave to appeal—O. J. A. sects. 33, 34.

Where the construction of a statute is involved in a judgment sought to be appealed from,

Held, leave to appeal to the Court of Appeal should be granted although the amount involved be less than $200.

Full Court.] [Dec. 7.

RUMOHR v. MARX.

Appeal to Divisional Court—Appeal after time elapsed—Mistake—Rule 522—Time for setting down.

Where a defendant's solicitor had notified the plaintiff's solicitor of his intention to appeal from a judgment to the Divisional Court, and gave instructions to his clerk to set the cause down, but the clerk, by mistake, supposing that the seven days mentioned in Rule 522 were not clear days, suffered the last day to pass without setting the cause down, and on applying the following day to set the cause down, found he was too late.

Held, that this was no ground for granting leave to set the cause down after the time had elapsed.

Held, also, that the seven days mentioned in Rule 522 are "clear days."

Full Court.] [Dec. 7

HUGHES v. HUGHES.

Appeal—Discontinuance—Costs—Appeal bond—R. S. O. c. 38, sect. 41.

Where an appellant gave notice of discontinuance, and the respondent thereupon, without taking out any order dismissing the appeal, proceeded and taxed his costs, and then applied for and obtained an order for the delivery out of the appeal bond for suit.

Held, that the order for the delivery out of the bond was regular.

Semble, also, that no order for the payment of the respondent's costs was necessary as a condition precedent to suing on the bond.

[The above four cases will be reported in full in our next issue.—Ed. L. J.]

Full Court.] [Dec. 9

FOLEY v. CANADA PERMANENT L. & S. CO.

Leave to set case down for appeal—Excuse for delay.

Moss, Q.C., for plaintiff, moved for leave to set cause down for hearing at the present sittings. The judgment sought to be appealed from was delivered on the 22nd November last. The plaintiff's solicitor immediately applied for a copy of the judgment, but did not receive it until the 29th November, which was the last day for setting the cause down for the present sittings. There was therefore no time to consult either the plaintiff or counsel as to whether the judgment should be appealed from.

Leonard, for defendants, opposed the application. He referred to *International F. Co.* v. *City of Moscow Gas Co.*, L. R. 7 Ch. D. 241; *Craig* v. *Phillips*, *Ib.* 249; *McAndrew* v. *Barker*, *Ib.* 701; *Re Mansell*, *Ib.* 711; W. N. 1878, 227; W. N. 1879-6.

The Court held the delay sufficiently excused, and granted the leave asked on payment of costs.

PRACTICE CASES.

Ferguson, J.] [Nov. 1.

HUNTER v. WILCOCKSON.

Judgment on endorsement—Statement of claim.

Motion for judgment on the endorsement on the writ. The action was for the rectification of a deed, and for a declaration that the plaintiff was entitled to a right of way, and for an injunction restraining defendant from interfering therewith. The endorsement stated the relief claimed; the defendant did not apppear within the time limited. He subsequently entered an appearance, but did not serve any notice thereof. Notice of the motion had been posted up in the office, as in case of non-appearance.

Bain, for plaintiff, claimed that he was entitled to judgment for the relief claimed by the endorsement, without delivering a statement of claim. That the plaintiff was not bound to deliver a statement of claim, unless the defendant required it.

Held, that a statement of claim must be filed.

Cameron, J.] [Dec. 5.

RE LINDSAY v. MORRISON.

Motion for prohibition.

This action was brought in the First Division Court of the County of York, for $175 due the

plaintiff, as he alleged, under agreement, and sufficiently ascertained by the signature of the defendant. The defendant, however, brought the whole agreement into Court, and resisted the action on the ground that there was a breach of warranty of certain articles operated upon by he agreement for which the $175 was part of the purchase money.

Rose, Q.C., for defendant, moved for prohibition on the ground that there is no jurisdiction to try a question of breach of warranty, where a sum of over $100 is in dispute.

Aylesworth, contra.

CAMERON, J., granted a prohibition unless the parties agreed to remove the case by *certiorari* without costs.

Cameron, J.] [Nov. 25.

FLEMING V. HALL.

Sheriff's fees—Poundage.

This was a motion to reduce the fees of the Sheriff of the County of Bruce, charged on the seizure in question.

The Master in Chambers held that the Sheriff was entitled for poundage as follows: If the amount realized by him is $1000 or under, 6 per cent.; if the amount is over $1,000 but under $4,000, 6 per cent. on the first $1,000 and 3 per cent on the balance; if the amount is $4,000 or over, 6 per cent. on the first $1,000, 3 per cent. on the excess up to $4,000, and 1½ per cent. on the remainder.

On appeal, CAMERON, J., upheld the Master's ruling.

Clement for the motion.

Cassels, contra.

LAW STUDENTS' DEPARTMENT.

EXAMINATION PAPERS.

SECOND INTERMEDIATE.

Common Law.

1 What are the various modes of raising the defence of estoppel by deed?

2. What is the contract of an endorser and acceptor of a bill of exchange respectively?

3. Discuss very briefly how far parol evidence is admissible to (1) explain, (2) to vary a written contract?

4. A company formed for the purpose of mining for salt and dealing in salt, by a written document, not under seal, contract to supply A with a quantity of coal oil. The company subsequently refuse to carry out the contract. Are they liable? Explain the scope of a corporations power to bind themselves by such a document as above.

5. What is the gist of the action of trover and trespass *de bonis asportatis* respectively?

6. What evidence of false pretence must be shown to sustain an indictment for obtaining goods by false pretences?

7. Name some of the exclusive and some of the concurrent subjects over which the Local Legislatures of the Provinces have legislative power.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Duress by threat of imprisonment of third person.—*Albany L. J.*, Nov. 25.

Slander—Imputation of crime.—*Ib.*, Dec. 2.

Our wives.—*Irish L. T.*, Nov. 11, 18.

Fraudulent agents.—*Justice of the Peace.*

Dedication—*Central L. J.*, Dec. 1.

Parent and child.—*Ib.*

Estoppels against married women.—*Southern Law Review*, Oct., Nov.

The law in relation to crops—*Ib.*

Negotiability of detached coupons—*Ib.*

The purchase by corporations of their own capital stock—*Ib.*

Disfranchisement from private corporations.—*Am. Law Reg.*, Nov.

Fugitives from justice—Some points of practice.—*Criminal Law Mag.*, Nov.

Criminal attempts.—*Irish Law Times*,, Nov. 25.

Tender of mortgage debt after day of payment.—*Central L. J.*, Nov. 24.

Limited partnership.—*Ib.*. Dec. 8.

Implied covenant of fitness on lease of real estate.—*Albany L. J.* Dec. 9.

CORRESPONDENCE.

Rights and Wrongs of the Profession.

To the Editor of the LAW JOURNAL.

SIR,—Like the old woman who had so many children that she did not know what to do—there is an enterprising firm of young lawyers in this town who have more students than clients, consequently they are not unfrequently driven to despair.

Knowing that a brother professional, also practising in Barrie, had received an application from a client for a loan, the aforesaid "E. F. of Y. L." in order to bring grist to the mill, and thereby encourage a spirit of industry amongst their clerks, (which of course was very enterprising) caused to be written to the brother professional's client the following letter, which, after having been corrected, revised, and signed by one of the members of the aforesaid "E. F. of Y. L.," was deposited in Her Majesty's post office, and in due course received by the client:

"BARRIE, Nov. 10th, 1882.

"———, Esq., Vine, P.O.

"DEAR SIR,—Should you or any of your neighbours require or wish to borrow money upon mortgage security we are prepared to loan you the same at seven per cent. per annum.

"Yours truly, ———."

Comment upon this questionable letter is quite unnecesssary.

Talking of unlicensed conveyancers, I understand that our post-master, who does all the conveyancing in this place, has just negotiated for the purchase (for cash too!) of a complete set of Upper Canada Reports from one of the unfortunate but respectable members of the bar who has had to succumb to the evils of cheap conveyancing. It is needless to say that even a more thriving and learned trade than before will now be carried on. The new advertisement will appear next week I presume.

Yours, etc.,

AN OLD SUBSCRIBER.

Barrie, Nov. 23, 1882.

FLOTSAM AND JETSAM.

By the appointment of a "justice of the High Court" to succeed Vice-Chancellor Hall, Vice-Chancellor Bacon becomes the last of the Vice-Chancellors. The learned judge will be eighty-five years of age next February. He was called to the Bar fifty-five years ago, and has been on the bench fourteen years—a year less than the minimum service ordinarily alloted to judges.

The nomination of Mr. John Pearson, Q.C., to the judgeship of the Chancery Division, vacant by the resignation of Vice-Chancellor Hall, will meet with general approval. The Vice-Chancellor who now resigns made his reputation as a real property lawyer; his successor first became known as an equity draftsman—a subject having a closer bearing on the duties of a judge. Unless Mr. Pearson disappoints expectation, he will be a dignified and courteous, but firm judge—not so quick as to be hasty—and not so slow or discursive as to be unbusinesslike. He has been engaged in all the cases of importance in Mr. Justice Fry's Court and elsewhere, notably in *The United Telephone Company* v. *Harrison* decided last May. The confidence with which the opinion of Mr. Pearson has inspired solicitors while he was at the Bar may be transferred to the public when he is on the bench.

The arrest of Delany by M'Donnell, although probably only just in time to save Mr. Justice Lawson's life, was a little too soon in the interests of criminal justice. Apart from any charge of unlawfully carrying arms, it is a very nice question what criminal offence, if any, was committed. There was no "attempt to discharge arms with intent to murder," because the prisoner is not shown to have pointed the revolver or had his finger on the trigger; and, even if he had done so, but was prevented from pulling the trigger, the statutory offence would not, according to the ruling of Baron Parke in *Regina* v. *St. George*, have been committed. He was not guilty of "an assault with intent to commit a felony," because, although it is an assault to point a loaded pistol within range, it is no assault merely to put the hand on the butt of a pistol, even while in a threatening attitude. It may, however, be that a common law misdemeanour, punishable with imprisonment, was consummated. There is authority for saying that an intention to commit a felony, evidenced by an overt act, is itself a misdemeanour. Dogging the footsteps of an intended victim, and confronting him with a hand on a loaded pistol, may, in the opinion of a jury, be overt acts evidencing such intention. If not, being in possession of weapons with intent to commit murder, as evidenced by some overt act, would seem to requre to be added to the criminal law of the country.—*Law Journal.*

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1882.

During this term the following gentlemen were called to the Bar, namely :—

Messrs. John Donald Cameron and Charles Walker Oliver, with honors; and Messrs. John Campbel, Ferrie Bown, Charles Joseph Leonard, Ernest Edward Kittson, Victor Alexander Robertson, Loftus Edwin Dancy, J. Hamilton Ingersoll, Henry Walter Hall, Robert Abercrombie Pringle, John Calvin Alguire, Frederick, Augustus Knapp, John A. Robinson and James Martin Ashton.

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Spencer Love. Francis Robert Latchford, John Alfred McAndrew, Henry Walter Mickle, Alfred Mitchell Lafferty, Charles True Glass, Arthur Eugene O'Meara, Angus McMurchy, Edward George Graham, Robert Hall Pringle, Smith Curtis, Willoughby Staples Brewster, John Frederick Grierson, Edward Kirwan C. Martin John Shilton, Christopher Robinson Boulton, Fenwick Williams Creelman, William Hume Blake, Francis Wolferstan Goodhue Thomas, William Morris, Alexander Clive Morris, David Fasken, James Baird, Frederick C. Wade, Geo. Sandfield Macdonald, George Goldwin Smith Lindsay, Alfred Herman Gross.

Matriculants—Joseph Stockwell Walker, George Ira Cochrane, D'Arcy DeLessart Grierson, Edward James Barrow Duncan, Francis Hall, John Franklin Wills, Henry Parker Thomas, William Francis Johnston, Thomas Atkins Wardell, William Howard Hearst, Norman McDonald, W. J. Millican, John McKay, Robert C. LeVisconte.

Juniors—Herbert Alfred Percival, John Healy Reeves, James S. Chalk, John Henry Alfred Beattie, Wesley Byron Lawson, Henry Newbolt Roberts, Frank Foley Lemieux, James Percy Moore, James Herbert Sinclair, George Herbert Dawson, Neil McCrimmon, John Young Murdoch, Gordon Joseph Leggatt, George Henry Hutchison, George Luther Lennox, Richard Alexander Bayley, Edward Albert Crease, Joseph H. Jack, John Williams Bennett, Malcolm McLean, William George Burns.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1882—The Deserted Village.
The Task, B. III.

1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Conntry Churchyard.
The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1883 / 1885	Emile de Bonnechose, Lazare Hoche.	1882 / 1884	Souvestre, Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1882, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

William's Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday after 21st August.
Michælmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the second Tuesday before Hilary, Easter, Trinity and Michælmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the second Thursday before these Terms.

The First Intermediate and Solicitor Examinations will begin on the Tuesday before Term at 9 a.m.

The Second Intermediate and the Barristers Examinations will begin on the Thursday before Term at 9 a.m.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Bencher during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
" Diplomas	2 00
" Certificate of Admission	1 00

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TABLE OF REFERENCE

To Cases Noted and Reported in this Volume which Illustrate the Practice under the Ontario Judicature Act.

This table furnishes an easy means of reference to the English and Canadian cases bearing on the present practice of our Courts, which have been noted and reported in the "Notes of Cases" and "English Practice Cases" in the LAW JOURNAL in this volume. The first column indicates the number of the section or rule which is illustrated by a particular case (the rules being designated throughout by their marginal numbers), and the second column indicates the page in which the case in question is to be found.

	Page.
Rule 2	57, 362
" 7	161
" 40	119, 235
" 42	243
" 45	99, 136, 243
" 57	119
" 78	99
" 80	106, 242, 371
" 90	141
" 92	78
" 94	276
" 95	19
" 97	325
" 98	179
" 99	179
" 100	119
" 103	18
" 107	217
" 108	56, 136
" 111	56
" 127	40, 80, 204
" 128	53, 142, 236, 371
" 131	59
" 133	80
" 144	383
" 149	204
" 152	204
" 157	60
" 158	425
" 159	425
" 164	60
" 176	261
" 178	204
" 189	18
" 190	343
" 217	18
" 218	18
" 221	118
" 224	402
" 235	44
" 255	427
" 269	427
" 274	54
" 285	14, 180, 402
" 317	54
" 318	205
" 322	261
" 323	14
" 324	74, 77
" 339	279
" 343	79, 80
" 346	119, 235
" 365	326
" 370	166
Rule 371	217
" 374	101
" 375	101
" 376	217
" 385	60
" 404	203
" 406	59, 326
" 414	55, 240
" 420	166
" 422	203
" 425	203
" 427	55, 76
" 428	136, 243, 261, 325, 342
" 439	56
" 440	224
" 442	223
" 443	98
" 462	55
" 471	342
" 484	20, 43
" 490	203
" 494	342
" 501	120
" 522	444
" 523	342
Section 3	101
" 4	402
" 9	101, 160
" 9, sub-secs. 2, 3	342
" 12	40, 342
" 16	40
" 16, sub-sec. 4	75, 136, 204, 217
" 16, sub-sec. 8	80, 204, 362
" 29	342
" 32	57, 136, 160, 342
" 33	342, 426, 443
" 34	443
" 35	342
" 36	218, 329, 342
" 37	100
" 38	42
" 39	43, 342
" 43	421
" 45	402
" 47	180, 261, 329
" 48	303, 329
" 52	342
" 77	78, 79
" 87	43
Gen. Order 16	80
" 26	18
" 33	424
" 44	343

INDEX.

Accounts,
taking of by Official referee, 180.
Accretion,
Soil washed away and restored, 82.
Act of God,
Property wrongfully replevied destroyed by, 409.
Administration,
foreign assets, costs, 67.
order for refused, application too soon, 99.
deficiency of assets, secured creditors, 121.
conduct of proceedings, receiver, 130.
of insolvent estate, 231.
cases within G. O. 638 and 639, 241, 242.
disposition of costs, general principles, 252, 282.
default of executor, costs, 423.
see Trustee—Will.
Adoption,
promise to make will in favor of child, 177, 328.
Agent—*see* Principal and agent.
Agreement,
compromise of action—lien—improvements, 442.
Alimony,
interim, time to apply for, 265.
particulars of acts complained of, 426.
American Law Magazine.
notice of, 250.
American Law Register,
notice of, 105.
Annuity,
construction of devise, 157.
Anson's Law of Contracts,
review of, 21.
Appeal,
none from Judge to Divisional Court, 10, 100.
time to, O. J. A. sec. 38—R. S. O. ch. 38, sec. 46, 42.
cross appeals, costs, 43.
leave to appeal from master's order, 55.
interpleader as to $500, other property up to $2000 affected, 443.
when construction of statute involved, 443.
after time elapsed, mistake, 444.
excuse for delay, 444.
from order of judge of Q.B.(P.Q.), jurisdiction, 423.
mistake as to time, offer to expedite, costs, 26.
security for costs of, application for return of, 76.
Appeal—*Continued.*
fresh evidence for Appellate Court not allowed, 212.
on weight of evidence, 422.
absence of evidence, practice, 213.
from judge's order, practice as to hearing, 218.
further evidence on refused, 236.
intermediate—jurisdiction, 313, 329, 341.
jurisdiction of Divisional Court, 313, 329, 341.
bond in, use of "and" for "or," 329.
discontinuance, costs, 444.
delay in filing—delay out of court, 426.
see Appeal, Court of—Division Court.
Appeal, Court of,
making certificate of judgment of, an order of High Court, 56.
orders of, setting aside awards, costs, 281.
reviewing order of Judge under O. J. A. sec. 48, 303.
power of amendment by, 396.
Apprentice,
contract with, place where to be performed, 114.
Arbitration,
O. J. Act, jurisdiction as to order for witnesses, 102.
award not necessary to make Rule of Court, 113.
requisites of notice of motion to set aside, 113.
evidence taken in absence of parties, 279.
costs—"in any action," 232.
when order acts severable to rest of award, 279.
Arrest,
solicitor may arrest for costs due to client, 399.
Articles of interest in contemporary journals—84, 103, 147, 207, 227, 291, 312, 372, 428, 445.
Assembly,
lawful, but unlawful consequences, 397.
Assignment f. b. o. c.,
partnership or separate creditors, 383.
Attachment,
motion for, must be on notice, 326.
Attachment of debts,
trust money, right of c. q. t., 101.
absence of suggestion by garnishee. 101.
of equitable claim, money in hand of receiver, 166.
debt must be absolute not conditional, 217.
Auction sale—*see* Vendor and purchaser.

Australian Law Times,
notice of, 189.
Award—*see* Arbitration.

Bailor and bailee,
bailee disputing title, *jus tertii*, 130.
Banking,
bank account, lien of bank, 81.
cheque, delay in presentment of, 153.
duty of drawer as to stopping, 213.
when placed to credit of account by bank, 213.
Bench and Bar,
the "uncertificated" doing business in Surrogate Courts, 62.
limiting time for argument of counsel, 86.
junior counsel not to take a position in conflict with senior, 144.
witty sayings by Jessel, M.R., 210, 270, 394.
Judge adjourning court over race day, 250.
overruling prior decisions, 379.
Bills of Lading,
excess in quantity named, custom, 278.
recent recisions on, 410.
Bill of Sale,
consideration not truly stated, 131.
Bills and Notes,
notice of dishonor, married woman, 12.
duty of notary as to, 384.
alteration by joint maker, 60.
endorsement in blank, 60.
principal and surety, insolvent maker, 60.
agreement as to liability, 61.
fictitious payee, 81.
re-endorsement, circuity of action, 111.
bill accepted, but not signed by drawer, 339.
restricted negotiability, 370.
mutilation, innocent holder, 370.
consideration, threatening prosecution for felony, 377.
unstamped note taken in lieu of another, 384.
double stamping, effect of repeal of Stamp Act, 438.
see Limitations, Statute of.
Blackstone's Commentaries by Ewell,
Notice of, 428.
Boarding house,
evidence as to, 365.
Bond—*see* Appeal—Constable—Municipal law—Replevin – School trustees.
Bribery,
punishment of, in England, 2.
Bramwell, Sir George,
raised to the Peerage, 45, 85.
British Columbia,
administration of justice in, discussed, 26, 127, 127, 151.
correspondence thereon, 167, 181, 224, 244, 265, 389.
recent general orders of Supreme Court, 168.
British North America Act,
distribution of legislative power, 196.
vesting of railway and other public works, 198.
British North America Act—*Continued.*
proposed amendment to, by Mr. Mercier, 210.
power of Provincial Legislature to impose hard labour, 275.
delegation of powers under, 275.
proceedings of Governor in Council, 314.
Building Society,
mortgage to officers without seal of Co., 75.
position of, in Australia, 189.

Carrier,
special condition as to liability, 396.
Charitable society,
expulsion of member, 327.
Chattels,
logs mingled and indistinguishable, right of owners, 239.
Chattel Mortgage,
prior advances, pressure, 96.
sale under, without renewal, interpleader, 97.
setting up new title, 97.
refiling after sale of goods, 166.
affidavit by agent, 166.
defective, effect of, 241.
by trustees of church, evidences of fraud, 275.
registration, Sunday last of five days, 367.
obtained under pressure, 96, 440.
description of goods, 440.
see Bill of Sale.
Cheque—*see* Banking.
Children,
the value of, discussed, 315.
adoption—*see* Adoption.
Chose in Action,
action by assignee—set off—R.S. O., c. 116, ss. 7 and 10, 40.
Club,
sale of liquor by—"retail"—license, 230.
Colonies.
Tarring on law relating to, 406.
Commission,
agent acting for both parties, 60.
to guardian in partition suit, amount, 243.
condition precedent not fulfilled, 396.
Commissioner for Administering Oaths,
Inconvenience of being limited to county, 63.
Commission to take evidence,
evidence not used, costs, 13.
foreign, return of, 424.
Computation of time,
appearance—execution—Sunday, 76, 143.
meaning of "forthwith," 132.
"clear days" under Rule 522, 444.
Company,
winding up, 41 Vict. cap. 5, 337.
carrying on business contemplated, 338.
practice, costs, 380.
see Deceit—guarantee.
Compromise, *see* Agreement.
Consolidation,
of cross actions, 362.
Constable,
breach of duty, bond, 61.

Constitutional Law,
law school lecturers, by Mr. Hodgins, 4.
the Governor-General in Council, 314.
see British Columbia, British North America Act.
Contempt of Court,
Justice of Peace no power to commit for, 61.
Contracts,
Anson on, review of, 21.
damages, warehousing goods, 49.
illegal, recovery of money paid, 49.
construction, arbitration, 120.
recitals, 174.
pleading, 177.
time of the essence, 365.
condition precedent, 369.
"unauthorised" but not illegal, 130, 395.
with illegal association, 130, 395.
breach of notarial, representations of Crown, 138.
impossibility of performance, 366.
rescission of, misrepresentation, 174.
see Agreement — Specific Performance — Vendor and Purchaser.
Conveyancers,
law as to, in Manitoba and Australia, 86.
Conveyancing,
proposed Act to simplify, 65.
O'Sullivan's Manual of, 122.
Conviction,
quashing, jurisdiction, 10.
certiorari, recognizance, 120.
power of sessions as to amendment, 277.
return of—*see* Justice of the Peace.
Copyright,
Mr. Dawson's pamphlet on law of, 404.
Corporation,
liability of, for acts of officer, 238.
Directors, validity of proceedings when no proper quorum, 298.
ratification of action of, 298.
see Guarantee—Joint Stock Co.
Costs,
when defendants sever, 3.
mutual mistake of parties, 13.
guarantee by solicitor, execution, 14.
taxation—practice under rule 439 and R. S. O., c. 130, s. 49, 56.
solicitor and client—refund, 75.
retainer, 97.
order for payment, 143.
Rule 442, special items, 423.
appeal, bill of over $200 reduced to $200, 426.
settlement to deprive solicitor of, 56.
certificate of judgment by Court of Appeal, 98, 243.
of incumbrancers, 112.
third party, appeal, 136.
security for—29, 30 Vict., cap. 42, 76.
payment out, appeal, 121.
misstatement by plaintiff of his residence, 166.
discretion of Court as to, extends to future proceedings, 325.
Costs—*Continued.*
when nonsuit on some issues, 261.
judgment ambiguous as to, procedure, 261.
interlocutory proceedings, stay till payment, 377.
of the day, none under O. J. A., 425.
see Administration—Arbitration—Married Woman—Solicitor—Trustee.
Contemporary Journals—*see* Articles of Interest in.
Counsel fees,
right of action for, 218.
Counterclaim,
hypothetical case, 14.
not connected with subject matter, 75.
practice, summons or notice, 203.
new tariff required, 391.
County Court,
Practice in, since Judicature Act, 62.
Exercise of discretion in amendments, 145.
Practice—Summons or notice, 203.
New tariff required.
County Court Judges,
appointment and removal of, rights of local legislatures, 63, 74.
misconduct, impeachment, commission of enquiry, 74.
Covenant,
construction of, 156.
running with land, assignee with notice, 175.
"Criminal Cause,"
interpretation of words, 20, 43.
Criminal Law,
assault, evidence of defendant, 10.
right of municipality to pass by-law inflicting imprisonment with hard labor, 61.
compounding felony, mortgage given for, void, 81.
meaning of "maliciously," 114.
proposed alteration of, as to appeals in England, 149.
case reserved as to selection of jurors, proper remedy, 239.
statistics of, for 1880, 260.
see Larceny—Murder.
Creditor's Suit.
injunction restraining action, 100.
Crown,
no legal redress for wrong against, 219.
contract with, liability, 271.
see Public works—Statute of Limitations.
Cy-pres, doctrine of,
charitable bequest, 67.
Cruelty to animals,
killing trespassers, 102.
Covenant,
construction of, 156.
running with land, assignee with notice, 175.
Damages,
warehousing goods, contract, 49.
remoteness, rules as to, discussed, 51, 114.
loss on resale, 232.
extent of—obstructions, 93.
future—lateral support, 96.

Damages—*Continued.*
measure of—breach of contract, 229.
principal and agent, 395.
valuation of—condition precedent to action for, 396.
Day, Mr. Justice,
appointment of, 249.
Deceit,
fraudulent prospectus of company, 319.
Deeds, construction of,
recital, covenant, 68.
life lease, exception, 94.
fee subject to life estate, rule in Shelley's case, 441.
Delegation,
of legislative power considered, 431.
Demurrer,
general, when allowable, 343.
Description,
sufficiency of name, 302.
Dismissal of Action,
for want of prosecution, case struck out by consent, notice of trial, 427.
Discovery,
action on marine policy, ship's papers, 118.
shorthand notes, privilege. 233.
action to recover lands, 383.
see Vendor and purchaser.
Distress,
damage feasant, illegal sale, 365.
see Mortgage.
Distribution, Statutes of,
intestacy, collaterals, 121.
Ditches and Watercourses,
duty of fence viewers, jurisdiction, description of premises, 15.
Division Courts,
jurisdiction, interest, "ascertained by signature," etc., 40.
title to land, separate estate of married woman, 40.
action for rent and taxes, 48.
process has no effect outside Ontario, 371.
fieri facias and "warrant of execution" are the same, 76.
security for costs may be ordered, 371.
appeal, practice, 98.
review of inspector's report for 1880, 150.
judgment debtor, means and ability to pay, 390.
irregular application for new trial, 425.
prohibition unless agreement to remove, 445.
Divisional Court—*see* Appeal.
Drainage—*see* Municipal Law.
Drinks, drinkers and drinking,
review of Mr. Roger's book on, 102.
Duress,
threat of suicide by husband to wife, 60.

Easement,
requires registration in Nova Scotia, 162.
see Light—Party wall—Riparian proprietor.
Ejectment,
proof of title, possession, evidence, 41.
writ may issue from any county, 403.
Elections, (Parliamentary)
certificate to witness, "criminal cause," 43.
refusal to give conclusive, 50
recount, irregularities by D. R. O. as to ballots, 304, 324.
written ballots used, 304.
ballots numbered by D. R. O. 309.
ballots marked by coloured pencil, 324.
irregular marking of ballots, 324.
jurisdiction of High Court, petitions in wrong court, 349, 400.
interference of Provincial Government in, 400.
requirements of petition, 400.
Equity of Redemption,
statute of limitations, parties, 263.
Estate tail,
bar of, by mortgage, reconveyance to mortgagor, 221.
Estoppel,
by lapse of time, partners, 108.
doctrine of, not to be extended, 396.
Evidence,
corroboration, extent of, required by Act, 11.
de bene esse in old suit, 155.
examination of witness, pending motion, 180.
proof of order in council, 401.
see Appeal.
Examination,
of parties, at what stage allowable, 166.
of documents, prolonged. meaning of, 303.
of infants, R. S. O. cap. 40, 371.
of plaintiff's daughter in seduction case, 402.
before appearance, 403.
of witness, pending motion, 180.
Execution,
issued in bad faith, 14.
when to issue after appeal, 43.
equitable, 265.
mortgage of real estate, 344.
Executor,
liability of one for acts of another, 74.
compensation, risk, 262.
devastavit, laches, 379.
see Commission.
Extradition Treaty,
to what extent forgery within, 313.
promptness of U. S. authorities under, 353.
forgery, Ashburton treaty, 402.

False Representation—*see* Misrepresentation.
Fence Viewer's Act—*see* Ditches and Watercourses.
Fireman,
not bound to imperil his life tho' paid for services, 430.
Fisheries Act,
licence to fish, riparian proprietors, 220.
Fitzgerald, Mr. Justice,
appointment as Lord of Appeal, 229.
Fixtures,
mortgage, machinery, 10.
counters in store, 344.
Forgery,
false entries in official books, uttering, 402.

Foreclosure,
payment by tenant to mortgagee, stat. of limitations, 7, 257.
practice, no order allowing service necessary, 99.
opening, innocent purchaser, 387.
Foreign Judgment,
cause of action, jurisdiction, 22 Vict., c. 5, s. 58, 41.
Foreign State,
devise of government of, 273.
Frauds, Statute of,
Promise to pay debt of another, 366.
Fraudulent Conveyance,
setting aside, 142.
13 Eliz., cap. 5—consideration, 381, 384.
Fraudulent Preference,
defending one suit and not another, 13.
cognovit, pressure, 240.
remedy, delaying creditors, 241.
mortgagor and mortgagee, costs, 367.
see insolvency.
Fraudulent Representations,
claim for damages for, stat. of limitations, 154.
Friendly Society,
unauthorized loan, 130.

Garnishee—*see* Attachment of Debts.
Gift,
fiduciary relation, between parties, 296.
Goodwill of Business,
dissolution of partnership, 173.
Grant, Construction of,
to A. & B., to the use of A. & B., &c., as joint tenants, &c., 344.
Guarantee,
default in payment of note, 10.
of void debt of Co. by Directors, 215.
not under seal, R. S. O., cap. 121, 263.
Guiteau,
scenes at trial of, 2, 105.
Judge Cox's charge, 65.

Hall, V. C.,
resignation of, 353.
Harbours,
public, foreshore, 161.
Holker, Sir John,
appointed Lord Justice, 45.
death of, 209.
Hotel,
appointment of receiver, 89.
Horse Cases and Perjury—431.
Husband and Wife,
administration by wife, loan to second husband, 55.
separate equitable estate of wife, 140.
conveyance from wife to husband, 206.
post nuptial settlement, when invalid, 240.
gift by husband during coverture, 345.
see Statute of Frauds.

Imprisonment with hard labour,
right of municipality to pass by-law for, 61, 431.
Improvements,
compensation for, bad survey, 344.
under mistake of title after litigation begun, 142.
Incorporated Law Society Calendar, 314.
Incumbrancers,
writ to settle priorities, appeal, costs, 160.
Indecent assault,
subsequent conduct, evidence, 139.
Index Reporter,
notice of, 123.
Indictment, *see* Information.
Infant,
making ward of Court, practice, 214.
gift by, refusal to set aside, 252.
mortgage, ratification, 423.
Information,
in rem—onus probandi, 93.
difference between, and indictment, 153.
Injunction,
undertaking by plaintiff, practice, 74.
Insanity,
as a ground of defence in criminal cases, 45.
the Guiteau case, 1, 65.
Insolvency,
presence of debtor at creditors' meeting, 71.
composition and discharge, Acts in favour of debtor, 71.
construction of sect. 136 of Act of 1875, 74.
practising attorney dealing in lands, 75.
assignment to delaying not defraud creditors, 139.
mortgage in contemplation of, preference, 146.
pleading, trader, 161.
seduction, a "debt due as damages for a personal wrong," 221.
surplus after payment in full, 282.
undue preference, pressure, 347, 364, 369, 385, 440.
discharge, setting aside order of, 280.
concealment of assets, 384.
withholding information, defective books, 386.
Interest,
principles as to allowance of, considered, 294.
see Division Court—Mortgage—Solicitor.
International Law,
private, general maritime law, 53.
foreign administration, 387.
the bombardment of Alexandria, 299.
foreign marriage and divorce, 423.
Interpleader,
no appeal from order as to costs of, 57.
chattel mortgage execution, 75.
"execution creditors," meaning of, 76.
summary decision, no appeal, 362.
claimant not appearing, judge's decision final, 366.
Interrogatories,
when answers to be given, 44.

Insurance (Accident,)
voluntary exposure to risk, 385.
Insurance (Life,)
forfeiture by non payment, 81.
warranty, adding pleas, 142.
lapsed policy, unpaid cheque, 145.
incomplete policy—delivery—escrow, 228.
Insurance (Fire,)
no statutory conditions—wilful negligence, 94
vendor and purchaser, subrogation, 296.
payment of premium, waiver, 327.
statutory conditions, 345.
power of manager of company to compromise claim, 345.
see Subrogation—Vendor and Purchaser.
Insurance (Marine,)
free from capture or seizure, 154.
measure of underwriter's liability, 395.
discovery, ship's papers, 118.
Irregularity,
motion against, grounds must appear, 403.

Joint Stock Company,
subscription for stock, notice of call, 12.
calls on stock, allotment, vesting of shares, 53.
winding up—contributories, 91, 92.
policy holders, 113.
set off not allowable, 135.
simple contract creditor of, cannot have receiver appointed, 117.
illegally issued stock, shareholder, 146.
misrepresentation in prospectus, 176.
fraudulent prospectus, deceit, 319.
Judgment,
before appearance, Rule 324 O. J. O., 74.
when plaintiff barred by, from bringing another action, 74.
motion for, on default of appearance, 59, 424.
service of notice of, 59.
endorsement, statement of claim, 424, 444.
under rule, 80, 371.
by default in action begun in local office, 99.
final, on defence and counter claim, 261.
Judicature Act (England,)
jurisdiction in probate cases, 118.
canon of construction of rules, 235.
urors,
selection of, *see* Criminal Law.
Jury, Trial by,
in chancery, when allowed, 403.
transfer of cause to obtain, 402.
Justice of the Peace,
minute of proceedings by, what sufficient, 230.
disqualification from bias, 234.
return of conviction, when to be made, 283.
right of Provincial Legislature to appoint, 401.
Larceny,
money demanded by menaces, 135.
Landlord and Tenant,
lease, renewal, condition precedent, 7.
Landlord and Tenant—*Continued.*
alternative remedies for breach of covenant in, 231.
short form—covenant not statutory, 274.
for life, proviso for re-entry, 274.
evidence of surrender, 276.
covenant to keep up fences, removal, 277
dangerous place, negligence, 376.
"necessary repairs" by tenant, 379.
see Distress.
Lash, Z. A.,
resignation of, as Deputy Minister of Justice, 126.
Law Journal (England),
value of reports of, 169.
Law List (Rordan's),
notice of, 372.
Lateral Support,
founded on prescription, 31, 157.
artificial, removal, future damages, 96.
liability of employer or contractor, 157.
Law Reports,
Digest of, 1866 to 1880, 209.
Law Society,
proceedings of Mich. Term, 1881,
miscellaneous business, 35 *et seq.*
Report of Legal Education Com., 36.
" " Building Committee, 36.
" " Committee on Printing, 36.
proceedings of Hilary Term, 1882.
miscellaneous business, 199 *et seq.*
Report of Finance Committee, 200.
proceedings of Easter Term, 1882.
miscellaneous business, 255 *et seq.*
fees for shorthand notes, 258.
Report on Law School, 259.
" as to English barristers, 260.
proceedings of Trinity Term, 1882.
miscellaneous business, 356 *et seq.*
Report of Reporting Committee, 361
Law Student's Department,
examination questions, 84, 331, 445.
office hours for students, 122.
lectures by Mr. McDougall, 315.
defects and advantages of present law course discussed, 244, 249, 334, 349.
examination days in November, 388.
library for students, defects, 427.
Lease—*see* Landlord and Tenant.
Legislative power,
delegation of, considered, 431.
Leith, Mr.,
notice of his real property work, 393.
Lefroy, Mr.,
appointment of, as Chancery reporter, 210.
Libel,
conduct tending to injure reputation, etc., indictable, 61.
telegraph, liability of company, special damage, 164.
bad character of plaintiff, how this effects his rights, 232.
rumours to same effect before libel, 232.
Limitations, Statute of,
executor claiming as creditor, 11.

Limitations, Statute of—*Continued.*
payment on account, 12.
right of one person through action of another, 89.
wild lot defined by blazed line, delay in locating, 139.
boundary—possession, 140.
setting aside fraudulent conveyance, 142.
foreclosure or sale, a proceeding under R. S. O., c. 108, s. 4, 143.
claim for damages for fraudulent representations, 154.
mortgage—insolvency, 206, 207.
acknowledgement, tenants in common, 212.
estoppel, 367.
special devise, position of executors, 273.
partial possession, 275.
bill maturing Dec. 1, 1875, writ issued Dec. 1, 1881, 277.
foreclosure by mortgagee not in possession, 340.
fraud—judicature act, 375.
tenant of equitable tenant for life *v.* remainderman, 384.
trustee and cestui que trust, 386.
action by Crown against R. W. Co., 440.
see Foreclosure—Mortgage.

Light,
evidence as to enjoyment for 20 years, 214.
easement, R. S. O., cap. 108, sec. 36, 214.

Liquor,
sale after notice not to sell, 364.

Lodger,
or under tenant, distress, 170.

Lush, L. J.,
death of, 1
review of his life, 72

Maritime Court,
jurisdiction, action *in rem* under Lord Campbell's Act, 273.
power of court to deal with mortgages 285.
see Ships and Shipping, 285.

Maintenance,
beyond provision in will, 158.

Malicious prosecution,
meaning of terms "reasonable and probable cause" and "malice," 134, 277.
setting criminal law in motion, evidence, 279.

Mandamus,
nisi, procedure in impeaching return to, 45.

Manitoba,
curious mistake in Statutes of, 149.
bill to admit Ontario lawyers to practice in, 235.
proposal to publish legal journal in, 293.
disallowance of railway charters, 409.

Marriage,
bill to legalize, with deceased wife's sister, 149.
singular contract of, 169.
foreign, and divorce, alimony, 423.

Marriage Settlement,
covenant by infant wife. 89,
post nuptial, consideration, insolvency, 145.
see Trustee.

Married Woman,
promissory note, notice of dishonor, 12.
separate business, personal liability, 54.
no order against for goods supplied during coverture, 160.
cultivating her own land, crops, execution *v.* husband, 166.
suing separately, security for costs, 325.
new property act in England, 330.
contract as to separate estate, 388, 404.
see Division Courts.

Master and Servant,
restraining servant from using knowledge of master's business, 60.
negligence, unusual machinery, 60.
specially dangerous machinery, 81.
foreman when not a fellow servant, 81.
extraordinary risks, 82.

Master, Local,
powers of, reference, 329.

Master in Chambers,
jurisdiction—witness—master's office, 14.
leave to appeal from, 55.
power to commit for non-production, 166.
power to transfer actions, 180.

Master in Ordinary,
jurisdiction—examination of witnesses, 14.
decree erroneous—stay of proceedings. 15.

Mechanic's Lien,
covers foreman in a mine, 60.
extent of right, parties, priority, 369.
contractor and sub-contractor, 440.
condition precedent, architect's certificate, 440.

Minute of Proceedings—*see* Justice of the Peace.

Misrepresentation—*see* Contract — Fraudulent Representation - Principal and Surety—Specific Performance. Vendor and Purchaser.

Mortgage,
Statute of Limitation express trust, 8.
fixtures, machinery, 10.
consolidation of, 30.
deposit of title deeds with bank, 30.
distress clause in mortgages, suggestion, 44
effect of, tenancy at will, 400.
interest not reserved on, 58.
"without interest if paid when due," 58.
mortgagee in possession, 70.
agreement to postpone, non-registration, priority, 92.
equity of redemption, merger, 94.
indemnity, 165.
by company, right of distress after winding up, 108.
computation of interest when successive mortgages, 113.
when mortgagee by claiming whole money bound to accept, 142.
right of mortgagee to growing crops, 143.
action to declare void, delivering up deeds, 160.
purchase of part of mortgaged estate, 165.
sale under, bill of costs of sale, subsequent incumbrances, 221.

Mortgage—*Continued.*
service of notice, alterative mode, 326.
payment off, interest in advance, mortgagee proving claim, 222.
proviso for increased interest on default, 241.
payment—transfer—trespass. 277
consolidation, 254.
unpaid taxes may be added to mortgage debt, 429.
pledgee of—account—redemption, 441.
see Fixtures — Foreclosure — Fraudulent Preference—Redemption.

Mortmain Act,
charitable bequest payable out of impure personalty, 131.

Municipal Law,
arbitration between city and county, 11.
disclaimer by alderman, when to be made, 42.
drainage by-law, withdrawal of petition, 53.
alteration in work petitioned for, 53.
rate—award, 278.
ultra vires, mandatory injunction, 346.
defective streets, notice to corporation, 61.
overflow from sewer, liability, 95.
treasurer's bond, extent of liability, 176.
municipality may take mortgage on land, 223.
by-law to open road.
extending limits of town, arbitration, 368.
award against township, 368.
quo warranto, setting aside, appeal, 385.
see Criminal Law—Taxes.

Murder,
meaning of "deliberate," 61.
dying declaration, evidence, 102.

Mutual Insurance Company,
default in payment of shares, 11.

Navigable Stream—*see* Riparian Proprietor.

Negligence,
master and servant—*see* Master and Servant.
injury caused by railway fires, 60, 141.
overflow from sewers, liability of corporation, 93.
throwing down lighted match, fire, 144.
contributory, railway accident, 364.
action by intestate's administrator for injury from, 377.
liability of stranger for defective article, 397.
see Public Works.

Negroes,
foolish prejudices as to, 250.

New Trial,
verdict against evidence, 135.

Nuisance,
rights of reversioner, noise. 133.

O'Brien, Mr. Justice,
death of, 84.

Official Referee,
taking accounts, report, 180.

Oaths, (religious)
Abolition of, in France, 333.

Ontario Judicature Act,
mode of working by judges, 270.
see Appeal—CountyCourt—Elections—Judicature Act (England)—Master in Chancery—Practice.

Ontario Legislature,
review of legislature, 106.

Osgoode Hall,
opening of Convocation Hall, 1, 65, 82.
petty pilfering at, 354.

Osgoode Hall Library,
latest additions to, 103, 267, 291, 351.
changes in, 126.

Osgoode Literary and Legal Society,
notice of meeting, 147.

Overholding Tenants Act,
forfeiture of lease, 10.

Ownership,
evidence of, 30.

Parent and Child,
adoption, promise to make will, 177, 328.

Parliamentary Printing,
construction of contract, 271.

Party Wall,
changing, easement, 179.

Particulars—*see* Alimony.

Parties,
demurrer for want of, 18.
trustees, 19.
next of kin, executors, 178.

Partition,
application for, made too soon, 99.
heir-at-law to share of proceeds of, conversion, 158.
Infants—parties—practice, 224.

Partnership,
subscription for stock, notice of call, 12.
real estate purchased with funds of, 82.
estoppel by lapse of time of partner claiming share, 108.
sharing profit and loss, 109.
restricting rights of one partner, 110.
action against firm, service on one, judgment, 119.
dissolution, good will, 173.
sale of property by one partner, evidence, 206.
judgment cannot be entered against one who has not appeared, 235.
accounts—costs, 263.
articles of, construction, 385.
see Solicitor.

Patent Law,
proposed changes in, in England, 1.
prior use of patent in colony, 156.
slander of title, damages, 213.
invention already in use, 276.
re-issue of patent, evidence, 347.
action for infringement, venue, 371.
should not be tried by jury, 402.

Payment into Court,
defence of non liability, taking out money, 18.

Pearson, Mr. Justice,
appointment of, 373.

Per autre vie, Estate by,
analogy of fee simple governs, 92.
Personal Representative,
dispensing with, practice, 172.
Physician,
fiduciary relation with patient, gift, 296.
Powers,
of appointment,
construction, wills act, 72.
appointment of portions before required, 215.
of sale,
to trustees of settlement, duration of, 254.
in mortgage, under value, 339.
Petition of Right,
right of action, for counsel fees, 218.
no legal redress for a wrong against Crown, 219.
right of fisheries, 219.
see Crown.
Pleading—*see* Practice.
Policeman,
dissertation on the duties of, 411.
Post Cards,
proposed reply cards, 393.
Poundage—*see* Sheriff.
Practice,
consent order, mistake of parties, 12
proceeding by *capias* not affected by O. J. A., 40.
statement of defence, Rule 128, 53.
trial by Judge, rehearing, jurisdiction of Divisional Court, 54.
statement of claim, amendment of, partial demurrer, 55.
enlargement of time for delivery, 243.
bringing in third party, notice, 57.
motion for judgment in default of appearance, 59, 424.
service of notice of motion, 59.
endorsement on writ, statement of claim, 424, 444.
devolution of cause of action, continuance of suit, 60.
pleading, amendment, opening up judgment, 98.
service of notices, 143.
counter claim and set off in reply, 204.
facts not stated in defence, 236.
ejectment by Crown, partial demurrer, ambiguity, 441.
change of reference as master ill, 121.
service out of jurisdiction, 136, 243.
adding parties, 141.
reference to Master, proper subjects for, 144.
appeal from order made on default of appearance, 155.
defendant wrongly described as to locality, 161
power of court to vary its orders, 203.
notice of trial after release of action, 240.
endorsement of writ, agreement to sell lands, 242.
joinder of parties, 276.
motion to vary report of official assignee, 261.
final judgment on defence and counter claim, 261.
Practice—*Continued.*
consolidation of cross actions, 362.
special endorsement, motion for judgment under Rule 80, 371.
exclusive jurisdiction of Chancery, jury notice, 402.
transfer of cause for jury or to speed, 402.
see Appeal—Arbitration — Counter-claim—County Courts—Creditor's Suit—Demurrer — Discovery — Examination — Judgment—Partnership—Parties—Replevin—Sale under Decree—Statement of Claim—Summons, Writ of.
Prescription,
acknowledgment of title, improvements in lieu of rent, 276.
see Lateral Support—Reversion.
Pressure, *see* Chattel Mortgage—Insolvency.
Principal and Agent,
agent acting for both parties, 60.
bank agent, 263.
agent to sell, does not include exchanging, 365.
measure of damages, 395.
contract by agent in his own name, 443.
see Commission—Lateral Support.
Principal and Surety,
notice—evidence, 40.
discharge owing to false representation, 139.
right of surety to co-surety's security, 140.
one partner taking place of firm, giving time, 143.
varying contract, 165.
transfer of securities on payment by principal, 253.
bond to school board, construction, mistake, 348.
Priority in Equity,
innocent purchasers, 90.
suit to settle, incumbrancer, 160.
Privy Council,
recent Canadian cases before, 159.
Prize Fight,
aiders and abettors, 234.
Probate,
when granted or refused, some curious cases, 111.
amendment of, when granted, 198.
Production of Documents,
extent of right and liability, 50.
Protest, *see* Bills and Notes.
Proxy, *see* Public Meeting.
Public Meeting,
right to demand poll an attribute of, 232.
proxies, demanding poll, 338.
Public Works,
liability of Crown for negligence of employees, 219.
Queen's Counsel.
appointments in Province of Quebec, 84.

Railways,
sale by trustees, powers, 69.
detention of freight, liability, 114.
acquiring land for special purpose, specific performance, 144.

Railways—*Continued.*
Ry. Co. to be judges of amount required, 252.
requisites of affidavit as to, 252.
failure to give signal, collision, evidence, 278.
assesssment of their lands discussed, 288.
right to land, forfeiture thereof, 302.
rights of municipality as to location of, on roads, 328.
lands "injuriously affected" by, 354.
point of commencement, meaning of "from,' 368.
expropriating public or private lands, 368.
pleading, setting out acts, 441.
accommodation works, 381.
superfluous lands, 383.
Receiver,
not entitled to conduct of proceedings, 130.
see Administration—Joint Stock Company.
Recovery of Land, *see* Ejectment,
Redemption,
dismissal of and reinstating bill, rights of purchaser, 403.
see Trustee.
Registry Laws,
easement in Nova Scotia, notice, 162.
records of lands, when notice and of what, 435.
Replevin,
O. J. A. does not apply to, 42.
except as to notice of trial, 43.
custodia legis, goods under seizure, 81.
bond in, proceedings stayed, 139.
possession as against wrong doer, 239.
Representation,
by loan company, collateral contract, 146.
Reporters,
changes at Osgoode Hall, 86.
uniform system of indexing and digesting, 86.
objectionable comments of public press as to, 353.
Revivor,
when in discretion of Court, 343.
Reversion,
meaning of in Prescription Act, 112.
Right of Entry,
sale of, 378.
Right of Way,
extent of right, 92.
of necessity, "premises," 262.
Riparian Proprietor,
reservation, easement, 12.
right to reasonable use of water, 96.
navigable streams, rights of owners on, 102.
Rivers, *see* Riparian Proprietor—Streams Act.

Salvation Army,
not liable for unlawful consequences of lawful assembly, 397.
Sale under decree,
deposit paid, default, resale, application for refused, 425.
Sale of Goods,
waiver of condition, 39.
Sale of Goods—*Continued.*
acceptance, waiver of objections, 277.
fraudulent purchase, disaffirming sale, 367.
Satisfaction,
evidence of award and satisfaction, 356.
Scholarships—*see* Law Student's Department.
School Trustees,
bond to by Sec'y-Treasurer, surety, 348.
action of, must be by meeting, 365.
election, waiver, retraction of waiver, 442.
Security for Costs—*see* Costs—Division Courts.
Seduction,
present state of law and suggested improvement, 151.
see Insolvency.
Separation Deed,
specific performance of, 109.
Sequestration,
when may issue under O. J. A., 279.
service out of jurisdiction. 279.
chose in action not liable under, 279.
Sheriff,
poundage on execution against lands, 41.
allowances by Master, 445.
obstruction of, in discharge of duty, 140.
Ships and Shipping,
sale of shares in vessel, surety, 140.
dismissal of master, also part owner, 163.
collision, mutual negligence, 272.
warranty of vessel, breach, loss, 277.
suit for wages, part due over 90 days from petition, 285.
covenant by master and part owner against overdue wages, 285.
meaning of "seaman," mode of hiring, 285.
proceeding in *rem*, mortgage intervening, 287.
hiring of seaman by part owners one of whom master, 287.
Slander,
privileged communication, character, 110.
repetition—privilege, 278.
Smith, Sir Montague,
retirement of, 45.
Solicitors,
dealing in lands, not subject to Insolvent Act, 75.
improper conduct, suspension, 81.
tariff of conveyancing fees, 82.
interest on costs, 98.
liability of unqualified practitioner, 135.
right of agent to retain money collected for, 153.
fraud of co-partner, 171.
agreement between, as to suit, 179.
power to settle suit, 180.
entrusted with money to invest, misappropriation, 299.
right to costs, 55.
taxation of costs—*see* Costs.
solicitor lending money to client, 70, 112.
criminal law, privilege, client's papers, 82.
negligence, sale under power, 326.
number of solicitors in England, 313.
Specific Performance,
doubtful title, 68.

Specific Performance—*Continued.*
separation deed, 109.
sale of lands, misrepresentation, 171.
form of order for, 196.
rehearing after decree for, 196.
misjoinder of parties, 387.
Statement of Claim,
omission of date of writ, 371.
filing and delivery of, time, 402.
Statutes (construction and interpretation),
power given under two acts, 53.
insertion of provisoes, 194.
"from time to time," 194.
"or" for "and," 231.
working hardship but imperative, 235.
Statute Labour,
commutation tax on non-resident land, 142.
Statute of Frauds,
sufficiency of description of parties, 178.
defects of, when applied to horse cases, 431.
contract by husband as to wife's property, 443.
see Vendor and Purchaser.
Stock Brokers,
treatise on law of, by Biddle, 227.
Streams Act,
result of *McLaren* v. *Caldwell*, 409, 430.
Subrogation,
vendor and purchaser, fire insurance, 296.
by insurers to rights of mortgagee, 264, 345, 373.
Suez Canal,
the legal position of, 398.
Suicide,
statistics and causes of, 429.
Sunday Laws,
works of necessity, 190.
Summary Conviction,
jurisdiction, distress, 10.
Summons, Writ of,
issue of, not judicial act, fraction of time, 115.
Supreme Court,
some points as to, discussed, 88.
rules of March 5, 115.
appeal, judgment on demurrer not a final judgment, 138.
changes in tariff, 247.
hours during which offices open, 249.
appeal to, from Court of Appeal, special leave, 421.
leave to file uncertified case, 421.
extension of time granted, 421.
no appeal from Q. B. (P.Q.), when, 422.

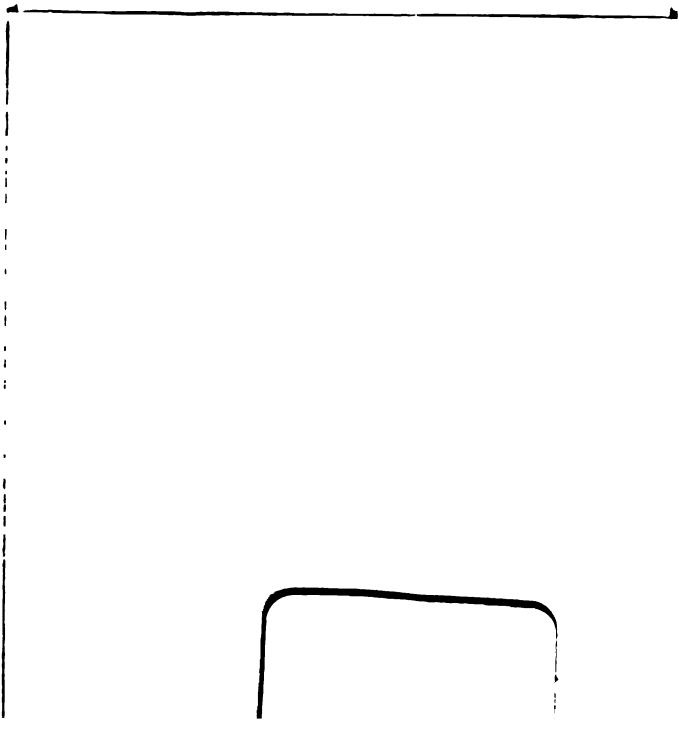
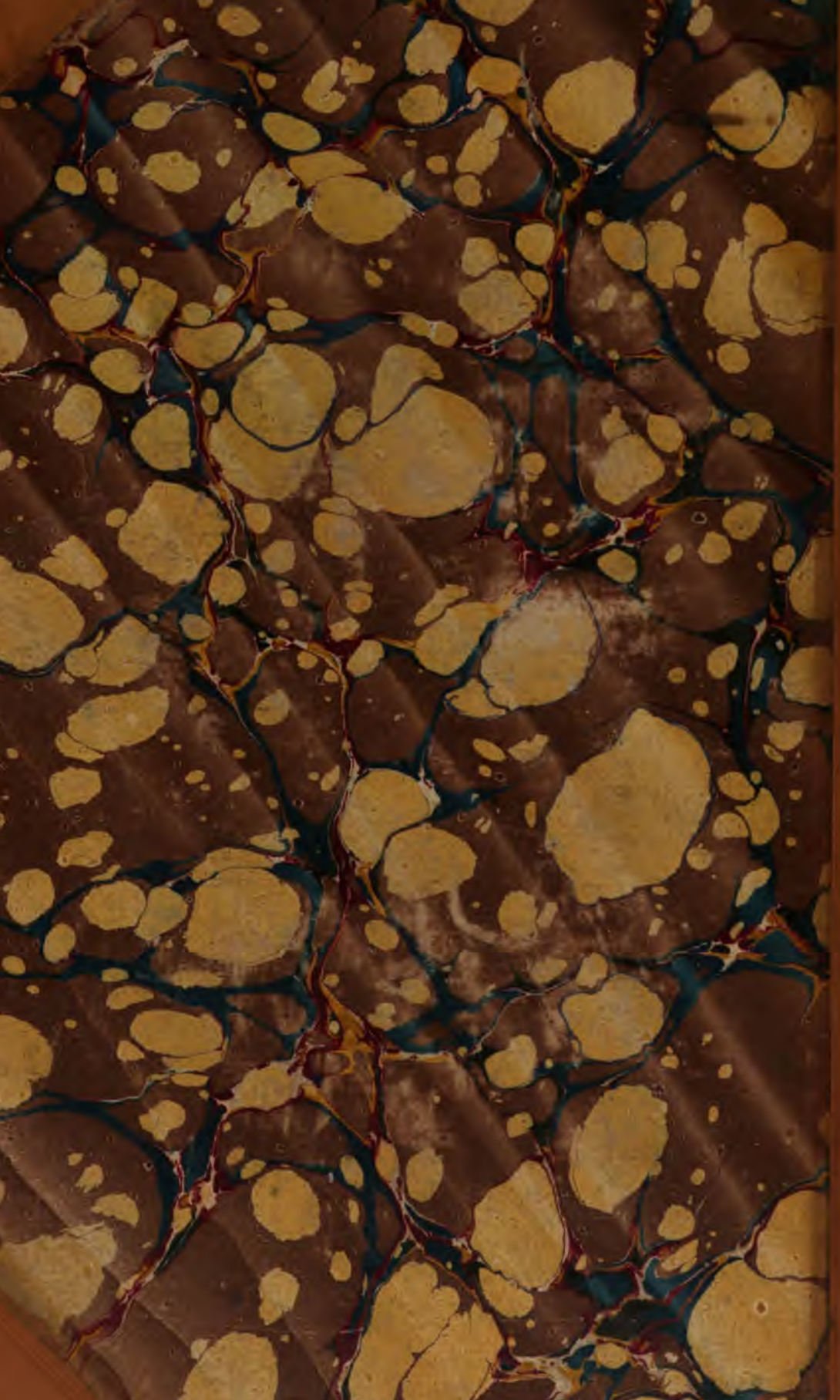
Tavern Licenses,
In P. Q., 14 George III, cap. 85, s. 5, (Imp.) 237.
Tavern Keeper,
sale of liquor after notice not to sell, 364.
Taxation, *see* Costs.
Taxes,
exemption from, probationer of Presbyterian church, 322.
Taxes, Sale for
invalid asssessment, bad description, 141.
Taxes, Sale for—*Continued.*
purchase by township clerk voidable, 141.
unpatented lands, subsequent Crown grant, 142.
Taxing Masters,
remarks of Brett, L.J., as to, 45.
Temperance Act,
different offences in one information bad, 401.
Terms Notice,
not necessary under O. J. A., 180.
Three Rivers,
tavern licenses in, 237.
Time,
fraction of, judicial acts, 115.
see Computation.
Tolls,
bridge company, reasonableness, 144.
timber slides, petition of right, 220.
Trade Mark,
tendency to deceive, 66.
trade name of firm, 102.
infringement, imitation, 237.
law of, some points in, 339.
Trespass,
fresh trespasses—license, 162.
Trover,
sale—lien—Insolvent Act 1875, 163.
Trustee,
parties in redemption suit, 19.
desirability of having official trustees, 26.
severance of funds for investment, 35.
marriage settlement, 54.
trust in favour of volunteer, 113.
equitable titles, legal estate, priority, 154.
restraint on anticipation, 156.
administration account, 178.
liberty to bid at sale, 274.
breach of trust, stale demand, 322.
costs of, discretion of Court, 342.
proceedings under Trustee Relief Act, appeal, 342.
tendency of modern decisions, 381.

Ultra Vires,
selection of jurors, 31-32 Vict. cap. 29 D., 239.
Undue Influence,
independent advice, when necessary, 145.
Unlicensed Conveyancers,
some advertisements of, 372.
correspondence of profession as to, 62, 389.
encroachment by, in England, 409.
see Surrogate Courts.

Vacation, Long,
suggestion of Law Society as to, 38.
notice as to business in, 270.
Vendor and Purchaser,
auction sale, Statute of Frauds, 9.
production of deeds, equitable mortgage, 30.
false representation, adding parties, 41.
fraud of agent, position of vendor, 82.
innocent purchaser, equitable priorities, 90.
sale *en bloc*, deficiency, 93.
possession, 95.

Vendor and Purchaser—*Continued.*
application under V. and P. Act, parties, 97.
purchaser not bound to accept vesting order. 97.
depreciation pending investigation of title, 97.
mock auction to perfect agreement, 102, 211.
payment into Court to stop interest, costs, 211.
mistake in contract, specific performance of part, 132.
sale of possessory title, 133.
lease, performance of covenants, 170.
contract to sell, insurance by vendor, 178.
description, Statute of Frauds, 321.
conditions of sale, leasehold, 195.
restrictive covenant, evidence, 205.
parties, discovery from one as against others, 211.
contract by agent in his own name, undisclosed principal, 443.
see Deeds—Construction of—Specific Performance—Statute of Frauds—Subrogation.
Vessel, *see* Ships and Shipping
Voluntary Deed.
application by grantor to set aside, 109.
undue influence, independent advice, 145.

Wallbridge, Hon. Lewis,
appointmeat as C. J. of Manitoba, 429.
Warranty,
implied, as to quality of chattel, 51.
Water Privileges,
application under R. S. O., c. 114, refused as not conducive to public good, 413, 430.
Wicksteed, G. W.,
classified table of statutes, by, 125.
Will,
solicitor to trust estate named by testator, 216.
administration, accounts, 95.
conduct of executors making them trustees, 273.
rectifying mistakes in, 301.
promise to make, discussed, 334.
power of sale, purchase from executor, 370.
acknowledgement of signature, 378.
invalid devise, possession, statute of limitations, 401.
no trustees of fund, administration, 402.
reformation of, evidence of intention inadmissible. 443.
see Probate.
Wills, Construction of,
"survivor," 6, 133.
uncertainty, duty of Court, 6, 257.
"in case of death" of devisee, 13.
gift to class, remoteness, 70.
power of appointment, 72.
executory devise, 88.
lapsed legacy, 91.

Wills, Construction of *Continued.*
"final division" of estate, 92.
after acquired property, 96.
power of sale with executor's consent, 96.
estate upon condition, 102.
disposition of residue, 110.
legacy reducible by testator's debts, 121.
"second cousins," 133.
annuities, perpetuities, 157, 172.
remoteness, condition, annuity, 172.
from and after decease of wife, vesting, 198.
when doctrine of election applicable, 267.
bequest of shares in partnership, 213.
next of kin, by virtue of statute of distributions, 214.
absolute interest, gift over on death, 215.
vesting, "worldly estate," 221.
executory interest, 222.
gift over, contingency, 223.
gift over in case of death, 231.
"issue and their heirs," 234.
legacy absolute or conditional, 273.
mistake, "forty" for "four hundred," 318.
double portion, satisfaction, 320.
revocation by general words, 322.
devise to son by father, predeceasing him leaving issue, 253.
precatory trusts, 355.
gift of maintenance, 370.
charge on land, 370.
cross limitations, implication, 382.
charities, mixed fund.
power of sale, power to mortgage, 424.
"legal heirs," mixed devise, 426.
devise of land not owned by testator, 442.
Winchester, John,
appointment as Registrar of Q. B., 353.
Witness,
examination, Master's office, 14.
Con. Stat. Can. c. 70, sec. 8, certificate, fees on second trial, 39.
refusal to attend, when allowable, 131
see Evidence.
Women,
may act as arbitrators, 61.
Wood, Hon. Mr. Justice,
death of, 353.
Words, Construction of,
"criminal cause," 20, 43.
"execution creditors," 76.
"from time to time," 194.
"in any action," 232.
"maliciously," 114.
malice, 134, 277.
"reasonable and probable cause," 134 277
"premises," 262.
see Wills, Construction of,
Young's Admiralty Decisions,
notice of, 428.

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